TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1943

No. 32

CONSUMERS IMPORT CO., INC., ET AL.,
PETITIONERS,

vs.

KABUSHIKI KAISHA KAWASAKI ZOSENJO AND
KAWASAKI KISEN KABUSHIKI KAISHA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 3, 1943.

CERTIORARI GRANTED MAY 10, 1943.

SUPREME COURT OF THE UNITED STATES

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INDEX.

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[fol. 1-11]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

IN THE MATTER OF THE PETITION OF KABUSHIKI KAISHA KAWASAKI ZOSENJO, Owner, and Kawasaki Kisen Kabushiki Kaisha, Bareboat, Charterer of the Steamship "Venice Maru," for exoneration from and limitation of liability, Petitioners-Appellees,

CONSUMERS IMPORT CO., INC., et al., Cargo Claimants-Appellants.

[fol. 12] PETITION OF KABUSHIKI KAISHA KAWASAKI ZOSENJO AND KAWASAKI KISEN KABUSHIKI

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The petition of Kabushiki Kaisha Kawasaki Zosenjo, Owner, and Kawasaki Kisen Kabushiki Kaisha, bareboat charterer of the Steamship "Venice Maru" in a cause of limitation of liability, civil and maritime, alleges on information and belief, as follows:

First. That, at all times hereinafter mentioned, the petitioner, Kabushiki Kaisha Kawasaki Zosenjo, was and now is a corporation organized under the laws of the Empire of Japan, with its head office located at Higashi Kawasaki-cho, Kobe, Japan, and was and now is the owner of the Steamship "Venice Maru."

Second. That at all times hereinafter mentioned the petitioner, Kawasaki Kisen Kabushiki Kaisha, was and now is a corporation organized under the laws of the Empire of Japan, with its head office at No. 8 Kaigan Dori, Kobe, Japan, and was and now is bareboat charterer of the said Steamship "Venice Maru," and manned, victualed and navigated said vessel within the meaning of Section 4286 of the Revised Statutes of the United States.

Third. The "Venice Maru" is a steel freight steamship of 6571.25 tons gross, 4013.48 tons net register, 405 feet long between perpendiculars, 53 feet beam and 37 feet

moulded depth to awning deck, built in Kobe, Japan, in 1929. The vessel is of the Three Island type with raised forecastle and poop, has six cargo hatches, each leading to upper and lower tween decks and lower hold. Nos. 1, 2 and 3 hatches are forward of the engine room and Nos. 4, 5 and 6 are aft. Each of said cargo spaces was at all times herein mentioned furnished with an adequate number of [fol. 13] metal ventilators extending to the weather deck of the vessel which were maintained in good order and condition.

The petitioners used due diligence to make said vessel seaworthy and, until the fire hereinafter mentioned occurred, she was tight, staunch, strong, fully manned, equipped and supplied, and in all respects seaworthy and fit for the service in which she was engaged.

Fourth. On July 13, 1934, the "Venice Maru" loaded with general cargo which she had taken aboard at Dairen, Shanghai, Keelung, Kobe, Nagoya, Shimizu and Yokohama, left Yokohama, Japan, bound for New York via Los Angeles and the Panama Canal. She was under the command of a competent and experienced master and was manned by competent and experienced officers and crew, and her cargo was well and properly stowed. She carried wood oil in bulk in her deep tanks located in lower hold No. 4, raw silk in the silk rooms in No. 2 and No. 5 tween decks, sardine meal in bags in lower hold No. 1, lower hold No. 3, lower tween decks No. 3 and in lower hold No. 6. Her other compartments were loaded with general cargo including tea, canned goods, cotton goods, wool, porcelain, toys, bamboo poles, etc. On the voyage due care was given to the ventilation of the cargo and whenever weather permitted one-third of the hatch boards covering the hatches were removed for the purpose of ventilation.

The vessel arrived at Quarantine, Los Angeles, on July 29th, 1934, at 8:45 A. M. and discharged certain cargo out of Nos. 1, 2, 5 and 6 hatches, and sailed for Balboa, Canal Zone, the same day at 9:35 P. M. The ship was then in good order and condition and the cargo apparently so.

On August 6th at 7:40 A. M., the vessel then being about three days distant from Balboa, Canal Zone, the ship's officers observed smoke coming out of the ventilators leading to No. 1 hold. The crew was mustered and ordered to shift the deck cargo and tween deck cargo in order to locate

[fol. 14] the fire. This work continued steadily until 7:40 P. M. when the officers entered No. 1 lower hold and found that bags of sardine meal stowed therein were heating and giving off smoke. Heated bags of sardine meal were removed to the deck until 9 P. M. when work stopped for the day, watchmen being stationed at the hatch of No. 1 hold throughout the night and two wind sails being rigged to assist in cooling the cargo.

At 8 A. M. on August 7th, the crew resumed its work of shifting the cargo from the lower hold No. 1 to the deck and this work continued steadily until 6 P. M. when it was stopped after 700 bags of sardine meal had been so shifted. Four men were stationed on watch in the hold during the night of August 7th—8th and the next day.

At 6 P. M. on August 8th, the smoke in No. 1 lower hold was found to be increasing and all hands were mustered and put to work shifting the cargo and pouring water on the bags that were too hot to be handled. At 8:10 P. M., it became impossible to continue work in the hold on account of the heavy smoke fumes and heat (the temperature of the bags then being 245° Fahrenheit). The Captain, considering that the entire venture was in imminent peril of destruction by fire, ordered the hatch and ventilators leading to this hold closed and water pumped into the hold.

A careful watch was kept through the night and the succeeding day and the crew continued to pour water into the hold by hose. At 6:30 A. M. on August 9th soundings showed 6 ft. 10 inches of water in the port bilge of No. 1 and 5 ft. 7 inches in the starboard bilge. At 3:35 P. M. the vessel cast anchor at Quarantine Station, Balboa, and the fireboat "Gorgona," which had been summoned by wireless, came alongside and started pumping water into No. 1 hold under direction of the Master of the "Venice Maru" in an endeavor to extinguish the fire in the hold. Flames as well as smoke were then visible. Soundings of No. 1 hold [fol. 15] at 4:25 P. M. showed 11 ft. of water, and at five o'clock 17 ft. of water, at which latter time the hatch was opened. At 5:20 P. M. flames were observed on the port side of the lower tween deck. At 7 P. M. anchor was raised and the ship proceeded to Balboa where she started to discharge cargo from Nos. 1 and 2 deck loads.

Water was continued to be poured into No. 1 hold until 2 A. M. on August 10th when it was stopped and the hatch was closed. At 2:25 P. M., under orders of the Harbor

Master, the vessel proceeded to the explosive anchorage off Panama where she anchored and thereafter resumed discharging cargo at No. 1 hatch. At 8 A. M. the fireboat "Favorite" came alongside and at 8:20 A. M. the steam valves of No. 1 shelter deck were opened and steam turned into the hold to attempt to extinguish the fire. At 10:30 A. M. the steam valves were shut off, the hatch was opened and the "Favorite" then proceeded to pour water into the hold. At 2 P. M. the hatch was closed and the steam valves were again turned on in the hope of finally extinguishing the fire.

At 6:30 P. M. the Captain of the "Favorite" came aboard and the "Venice Maru" thereupon raised anchor and proceeded to her berth where the Fireboat "Gorgona" came alongside. The firemen kept watch throughout the night and the steam valves into the shelter deck were kept open until 6:40 A. M. on August 11th when the No. 1 hatch was opened and hose was played on the burning cargo. This continued until 3 P. M. on August 11th when the fire was finally extinguished and the fireboat left.

Thereafter the petitioners appointed Messrs. Johnson & Higgins as Average Adjusters, and security was taken from the sound cargo to cover its proportion of the general average. The damaged cargo was removed from the ship, reconditioned as far as possible and thereafter restowed to be carried on to destination. Some of the damaged cargo, [fol. 16] including certain of the fish meal in No. 1 lower hold, was ordered destroyed by the Panama Canal Health Authorities, and some was left on dock at Panama Canal and later transshipped to destination. The ship itself was inspected by the surveyor of Lloyds Register of Shipping and allowed to proceed to destination.

On August 28th the vessel left Balboa, proceeded through the Canal and arrived at Cristobal at 9:40 P. M. of that day. After discharging certain cargo at Cristobal, she sailed for New York on August 29th at 3:35 P. M. where she arrived at Quarantine on September 5th at 8:30 A. M. and at her berth at Thirty-Third Street Wharf, Brooklyn, at 10 A. M. at which port she discharged certain of her cargo and then proceeded to Philadelphia and other Atlantic ports to discharge other cargo, after which she loaded cargo for the Far East at various United States Atlantic and Gulf ports and proceeded to Japan.

Fifth. As a result of the aforesaid fire and the steps taken to extinguish it, a large quantity of the cargo was damaged or destroyed. The "Venice Maru" and her equipment suffered damage in the estimated amount of $15,000.

Sixth. The losses, damages and destruction sustained by the vessel and its cargo by reason of the premises were not caused or contributed to by any fault, negligence or want of care or design on the part of the "Venice Maru," her owner or bareboat charterer, the petitioners herein or any one for whom the said petitioners may be responsible, but were due solely to fire.

Seventh. Said losses, damages and destruction were occasioned and incurred without the privity or knowledge of petitioners.

[fol. 17] Eighth. At the present time the petitioners do not know the amount of claims for such losses, damages and destruction.

Proceedings have already been begun against the petitioners and/or the "Venice Maru" for damages alleged to have been sustained by reason of the matters alleged herein as set forth in Schedule "A" annexed to this petition and made a part hereof.

In addition to the proceedings referred to in Schedule "A," a number of claims or notices of claims have been presented to the petitioners for loss of or damage to cargo as set forth in Schedule "B" annexed to this petition and made a part hereof. The petitioners expect that other claims will be presented against them and that other suits will be begun by the owners of cargo alleged to have been damaged in the fire and by underwriters insuring said cargo. The demands already made against the petitioners in behalf of various claimants probably amount to upwards of $300,000 as nearly as can now be estimated inasmuch as some notices of claim state no amount.

Ninth. There are no demands, unsatisfied liens or claims of liens against the said "Venice Maru," her engines, boilers, etc., or any suits pending thereon, so far as is known to petitioners, except as above set forth.

Tenth. The Steamship "Venice Maru" was damaged in the fire and the steps taken to extinguish the fire, and her value at the end of the voyage in said damaged condi-

tion was not in excess of $165,000. The freight pending for the transportation of cargo on board the "Venice Maru", on the voyage during which the aforesaid fire occurred amounted to $80,000. No passengers were carried and no passage money paid. The share of the general average expenses chargeable to the ship and the collect freight [fol. 18] amounted to approximately $65,000. Petitioners are advised that the entire aggregate value of the interest of petitioners in said Steamship "Venice Maru" and her pending freight, does not exceed the sum of $180,000. Subject to an appraisal of petitioners' interest on a reference, petitioners offer an ad interim stipulation for value in the sum of $245,000, said sum being in excess of the aggregate value of petitioners' interest in said vessel, her equipment and her pending freight.

Eleventh. Petitioners claim exemption from liability for the losses, damages and destruction occasioned or incurred by or resulting from the aforesaid fire and the steps taken to extinguish said fire and/or subsequent damages and for the claims for damages that have been or may hereafter be made, and petitioners allege that they have valid defenses thereto on the facts and on the law and under the provisions of the contracts for the carriage of cargo, the terms of which contracts will more fully appear upon the trial of this proceeding. Petitioners further claim the benefit of the limitation of liability provided in Sections 4281, 4282, 4283, 4284, 4285 and 4286 of the Revised Statutes of the United States and the various statutes supplemental thereto and amendatory thereof, and to that end petitioners are ready and willing to give a stipulation with sufficient surety for the payment into Court of the amount or value of the petitioners' interest in the "Venice Maru" and her pending freight whenever the same has been ordered by this Court, as provided by the aforesaid statutes and by General Rules Nos. 51 and 54 in Admiralty and by the rules and practice of this Honorable Court.

Twelfth. All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

[fol. 19] Wherefore, petitioners pray:

(1) That this Court cause due appraisement to be made of the amount or value of petitioners' interest in the Steam-

ship "Venice Maru" and her pending freight for the aforesaid voyage.

(2) That the Court make an order directing the petitioners to file a stipulation with surety to be approved by the Court for the payment into Court of the amount of petitioners' said interest whenever the Court shall so order.

(3) That the Court make an order directing the issuance of a monition to all persons claiming damages for any and all loss, damage, injury or destruction done, occasioned or incurred by or resulting from the said fire on the "Venice Maru" and steps taken to extinguish said fire upon the voyage hereinbefore described, citing them to appear before a Commissioner to be named by the Court in said order and make due proof of their respective claims, and also to appear and answer the allegations of this petition according to the law and practice of this Court at or before a certain time to be fixed by the monition.

(4) That the Court make an order directing that, on the giving of such stipulation as may be determined to be proper, or of an *ad interim* stipulation, an injunction shall issue restraining the prosecution of all actions, suits and proceedings already begun to recover for damages sustained on the voyage aforesaid and arising out of, occasioned by or consequent upon the fire and the steps taken to extinguish the same on the "Venice Maru" as stated in this petition, and the commencement or prosecution hereafter of any suit, action or legal proceeding of any nature or description whatsoever, except in the present proceeding against petitioners or either of them or their agents or representatives or any other person whatsoever or the "Venice Maru" in respect of any claim or claims arising [fol. 20] out of the aforesaid voyage and fire and the steps taken to extinguish said fire on the "Venice Maru."

(5) That the Court in this proceeding will adjudge that the petitioners and each of them are not liable to any extent for any loss, damage or injury, nor for any claim whatsoever in any way arising out of or in consequence of the fire above described or in consequence of the aforesaid voyage; or, if petitioners or either of them shall be adjudged liable, then that such liability be limited to the amount or value of petitioners' interest in the "Venice Maru" at the end of the voyage on which she was engaged

at the time of the fire described in this petition and her pending freight, if any, and that the money paid or secured to be paid as aforesaid be divided pro rata among such claimants as may duly prove their claims before the Commissioner hereinbefore referred to, saving to all parties any priorities to which they may be legally entitled, and that a decree may be entered discharging petitioners and each of them from all further liability.

(6) That petitioners may have such other and further relief as the justice of the cause may require.

Crawford & Sprague, Proctors for Petitioners, Office and P. O. Address, 117 Liberty Street, New York, N. Y.

(Verified by George C. Sprague, as one of the Proctors for Petitioners on November 15, 1934.)

(Schedules "A" and "B", attached to the petition, giving the names of the parties who had filed suit and the names of the parties who had failed claims or notices of claims, are omitted by agreement.)

[fol. 21] IN UNITED STATES DISTRICT COURT

ORDER OF BONDY, D. J., RE AD INTERIM STIPULATION—November 17, 1934

Present: Honorable William Bondy, District Judge.

Kabushiki Kaisha Kawasaki Zosenjo and Kawasaki Kisen Kabushiki Kaisha having filed a petition for the limitation of petitioners' liability as owner and bareboat charterer respectively of the Steamship "Venice Maru," and having prayed for an appraisal of the value of petitioners' interest in said vessel and her pending freight, if any, and for leave to file a stipulation for the amount of said appraised value or for an ad interim stipulation pending the appraisal of petitioners' interest in said vessel and her pending freight, if any, by a Commissioner to be appointed by this Court, and it appearing from the affidavit of Francis A. Martin, verified November 10, 1934, that the value of said vessel and her equipment as of September 5, 1934, was

$160,000; and from the affidavit of Charles E. Ross, verified November 10, 1934, that the value of said vessel and her equipment as of September 5, 1934, was $165,000; and from the affidavit of Robert S. Haight that the value of said vessel and her equipment as of September 5, 1934, was $164,000; and it appearing from the affidavit of T. Yajima, Representative in New York of the petitioner Kawasaki Kisen Kabushiki Kaisha, verified November 15, 1934, and filed here- [fol. 22] with, that the pending freight on said vessel at the termination of the voyage in which she was engaged at the time of the disaster mentioned in the petition filed herein is $80,000, making a maximum total of $245,000 for the value of the vessel and her equipment and pending freight.

Now, on motion of Crawford & Sprague, Proctors for the petitioners, it is

Ordered that the petitioners file herein an ad interim stipulation for the value of said vessel and equipment and pending freight in the sum of $245,000 with interest from the 5th day of September, 1934, the date of the termination of the voyage on which the disaster occurred, with surety, according to the rules and practice of this Court; and it is further

Ordered that any party may apply to have the amount of said stipulation increased or diminished as the case may be on the filing of the report of the Commissioner appointed to appraise the amount or value of petitioners' interest in said vessel and her pending freight, if any, or on the ultimate determination of the Court or exceptions to the Commissioner's report.

William Bondy, U. S. D. J.

[fol. 23] In United States District Court

Ad Interim Stipulation

Whereas, Kabushiki Kaisha Kawasaki Zosenjo, as Owner, and Kawasaki Kisen Kabushiki Kaisha, as Bareboat Charterer of the Steamship "Venice Maru" have instituted a proceeding in this Court for limitation of liability as such owner and bareboat charterer respectively, in respect of a fire which occurred on August 6th to 11th, 1934, while said vessel was at sea and the consequent damage

which is more particularly set forth in their petition filed herein on November 16, 1934, in which the petitioners prayed, among other things, that the Court will cause due appraisement to be made of the amount or value of their interest in said vessel and her pending freight, if any, upon a reference to be ordered herein and that a monition may issue to all persons claiming damages for loss, damage, injury or destruction by or resulting from said fire, citing them to appear before the Commissioner to be appointed by this Court and make due proof of their respective claims, and to answer the petition herein and that an injunction issue restraining the prosecution of any and all actions, claims or proceedings except under and in pursuance of the provisions of the monition granted herein; and

Whereas the petitioners wish to prevent further prosecution of all proceedings already instituted against the petitioners or the Steamship "Venice Maru" and the commencement of prosecution thereafter of any and all suits, actions or legal proceedings of any nature or description whatever in any and all Courts, and also wish to provide an ad interim stipulation for value as security for claimants pending the ascertainment by reference of the amount of the petitioners' interest in said vessel and her pending freight, if any;

[fol. 24] Now Therefore, in consideration of the premises, the Standard Surety & Casualty Company of New York, having an office and place of business at 80 John Street, Borough of Manhattan, City of New York, hereby undertakes in the sum of Two Hundred Forty Five Thousand and 00/100 ($245,000.00) Dollars, with interest from September 5th, 1934, that the petitioners will pay into Court within ten (10) days after the entry of an order confirming the report of the Commissioner to be appointed to appraise the amount or value of the petitioners' interest in said vessel and her pending freight, if any, the amount or value of such interest as thus ascertained, or will file in this proceeding a bond or stipulation for value in the usual form, with surety in said amount, and that, pending the payment into Court of the amount or value of the petitioners' interest in said vessel and her pending freight, if any, so ascertained, or on giving of a stipulation for value therefor, this stipulation shall stand as security for all claims in said limitation proceeding. Said Surety Company hereby submits

itself to the jurisdiction of the Court and agrees to abide by all orders of the Court, interlocutory and final, and to pay the amount awarded by the final decree entered by this Court or by an Appellate Court if an appeal intervene with interest, unless the amount or value of the petitioners' interest in said vessel and her pending freight, if any, shall be paid into Court by the petitioners, or a stipulation for value therefor shall be given as aforesaid in the meantime, in which event this stipulation to be void.

Dated, New York, November 16, 1934.

Standard Surety & Casualty Company of New York,
by: John R. English, Vice President.

Attest: Walter E. Makosky, Asst. Secretary.

[fol. 25] State of New York,
County of New York, ss:

On this 16 day of November, 1934, before me personally appeared Walter E. Makosky, Asst. Secy. of the Standard Surety & Casualty Company of New York, with whom I am personally acquainted, who, being by me duly sworn, said: that he resides in the State of New Jersey; that he is Asst. Secy. of the Standard Surety & Casualty Company of New York, the corporation described in and which executed the foregoing instrument; that he knows the corporate seal of the said Company; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said Company; and that he signed his name thereto as Asst. Secy. by like authority; and the said Walter E. Makosky further says that he is acquainted with John R. English and knows him to be the Vice-Pres. of said Company; that the signature of the said John R. English subscribed to said instrument is in the genuine handwriting of the said John R. English and was thereto subscribed by like order of said Board of Directors and in the presence of him, the said Walter E. Makosky and that the liabilities of said Company do not exceed its assets, as ascertained in the manner provided in Chapter 33 of the Laws of 1909, constituting Chapter 28 of the Consolidated Laws of the State of New York, and known as the Insurance Law.

Leo J. Guilfoyle, Notary Public.

[fol. 26] IN UNITED STATES DISTRICT COURT

ORDER DIRECTING ISSUANCE OF MONITION—November 17, 1934

Present: Honorable William Bondy, District Judge.

A petition having been filed herein on November 16, 1934, by Kabushiki Kaisha Kawasaki Zosenjo, Owner, and Kawasaki Kisen Kabushiki Kaisha, Bareboat Charterer of the freight Steamship "Venice Maru" claiming the benefit of the limitation of liability provided for in Sections 4281, 4282, 4283, 4284, 4285 and 4286 of the Revised Statutes of the United States and the statutes supplementary thereto and amendatory thereof, and also contesting their liability independently of the limitation of liability claimed under said Act for any loss, damage, injury or destruction sustained during or resulting from fire and the efforts used to extinguish the same on board the "Venice Maru" on August 6th, 7th, 8th, 9th, 10th and 11th, 1934, and said petition also stating the facts and circumstances on which said exemption from or limitation of liability was claimed, and on reading and filing the affidavits of value of the "Venice Maru" and her pending freight sworn to on November 10 and 15, 1934, and filed herein November 16, 1934, and the ad interim stipulation for value executed November 16, 1934, by The Standard Surety & Casualty Company of New York, in the sum of $245,000 with interest from September 5, 1934, filed herein November 16, 1934, undertaking to pay into Court within ten (10) days after [fol. 27] the entry of an order confirming the report of a Commissioner to be appointed to appraise the amount or value of petitioners' interest in the "Venice Maru" and her pending freight, if any, the amount or value of such interest as thus ascertained, or to file in this proceeding a bond or stipulation for value in the usual form with surety in said amount and that, pending the payment into Court of the amount or value of petitioners' interest in the "Venice Maru" and her pending freight as ascertained or the giving of a stipulation for the value thereof, said bond shall stand as security for all claims in this proceeding;

Now, on motion of Crawford & Sprague, proctors for petitioners, it is

Ordered that a monition issue out of and under the seal of this Court against all persons claiming damages for any

and all losses, damages, injuries or destruction occasioned by, arising out of or consequent upon the fire which occurred on board the said freight steamship "Venice Maru" during the voyage described in the petition and the efforts made to extinguish said fire, and against all persons having any claim against the said "Venice Maru" or her pending freight, if any, citing them to appear before this Court and make due proof of their ~~prospective~~ claims on or before the 31st day of December, 1934 at 10:30 o'clock in the forenoon and Godfrey Updike, Esq. is hereby appointed the Commissioner to whom proof of all claims which shall be presented in pursuance of said monition shall be made, subject to the right of any person to controvert and question the same, with liberty also to any person or persons claiming damages as aforesaid who shall have presented his or their claims to said Commissioner under oath to answer said petition; and it is further

Ordered that public notice of said monition be given by publication thereof in the New York Post, a newspaper pub- [fol. 28] lished in the Borough of Manhattan, City of New York, once a week until the return of said monition, the first publication to be at least thirty (30) days before said return day, and that a copy of said monition be served on the respective attorneys or proctors for all persons who at the time of making this order shall have filed libels or begun actions or suits for damage, loss or injury occasioned by, arising out of or consequent upon the fire aforesaid, together with a copy of this order, such last mentioned service to be made at least thirty (30) days before the return day; and it is further

Ordered that petitioners, not later than the day of the second publication of said notice, shall mail a copy of the monition to every person known to have asserted any claim against the vessel or petitioners or either of them, and to his proctor or attorney if known; and it is further

Ordered that the beginning or prosecution of any and all suits, actions, or proceedings, of any nature or description whatsoever except in the present proceeding, in respect of any claim occasioned by, arising out of, consequent upon or in connection with the aforesaid fire on the "Venice Maru" during the voyage described in the petition, be and they hereby are stayed and restrained until the hearing and determination of this proceeding; and it is further

Ordered that service of this order as a restraining order be made within this District in the usual manner or in any other District by the United States Marshal for such District delivering a copy of this order to the person or persons to be restrained, or to his or their respective proctors or attorneys.

Wm. Bondy, U. S. D. J.

[fol. 29] IN UNITED STATES DISTRICT COURT

MONITION

The President of the United States of America to the Marshal of the United States for the Southern District of New York, Greeting:

Whereas, a petition was filed in the District Court of the United States for the Southern District of New York on November 16th, 1934, by Kabushiki Kaisha Kawasaki Zosenjo and Kawasaki Kisen Kabushiki Kaisha, praying for exoneration for and limitation of their liability, and the liability of any other person or party interested in the freight Steamship *Venice Maru* concerning the loss, damage, injury or destruction done, occasioned or incurred by or resulting from a fire at sea on board the S. S. *Venice Maru* from August 6th to 11th, 1934, for the reasons mentioned in the petition and praying that a monition issue out of this Court citing all persons claiming damages for any loss, damage, injury or destruction to appear before this Court and make due proof of their respective claims, and answer the allegations of said petition and that, if it shall appear that petitioners are not liable for any such loss, damage, injury or destruction, it may be so decreed by this Court; and

Whereas, the petitioners have filed in the office of the Clerk of this Court an *ad interim* stipulation in the sum of $245,000 with interest from September 5, 1934, executed on November 16th, 1934, by The Standard Surety & Casualty Company of New York, undertaking to pay into Court within ten (10) days after the entry of an order confirming the report of a Commissioner to be appointed to appraise the amount or value of petitioners' interest in the S. S. *Venice Maru* and her pending freight, if any, the amount or value of such interest as thus ascertained, or to

file in this proceeding a bond or stipulation for value in the usual form with surety in said amount, and the said Court having directed by an order made and entered on November [fol. 30] 19th, 1934, that a monition issue against all persons claiming damage for any and all losses, damages, injuries or destruction occasioned during, resulting from or consequent upon the fire and loss aforesaid, citing them to appear before this Court and make due proof of their respective claims on or before December 31st, 1934 at 10:30 A. M., and Godfrey Updike, Esq., having been appointed Commissioner before whom proof of all claims which shall be presented in pursuance of said monition shall be made;

You are, therefore, commanded to cite all persons claiming damage for any loss, damage, injury or destruction done, occasioned or incurred on said voyage of said S. S. *Venice Maru* and all persons claiming damages or liens against the S. S. *Venice Maru* to appear before this Court and make due proof of their respective claims before Godfrey Updike, Esq., Commissioner, at his office 150 Broadway, Borough of Manhattan, City of New York, on or before December 31st, 1934, at 10.30 o'clock in the forenoon; and

You are also commanded to cite such claimants to appear and answer the petition herein on or before the last named date, or within such further time as this Court may grant, and to have and receive such relief as may be due;

And what you have done in the premises do you then make return to this Court, together with this writ.

Witness the Honorable John C. Knox, Judge of the District Court of the United States for the Southern District of New York, this 20th day of November, One Thousand Nine Hundred and Thirty Four and of the Independence of the United States the One Hundred and Fifty Ninth.

Charles Weiser, Clerk. (Seal.)

[fol. 31] IN UNITED STATES DISTRICT COURT

ANSWER OF CONSUMERS IMPORT CO., INC., TO PETITION

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The answer of Consumers Import Co., Inc., on its own behalf, and on behalf of all other claimants similarly situated, to the Petition of Kabushiki Kaisha Kawasaki Zosenjo and Kawasaki Kisen Kabushiki Kaisha, as owner and alleged bare-boat charterer of the steamship "Venice Maru," in a cause of limitation of liability, civil and maritime, alleges and respectfully shows to this Honorable Court, as follows:

First: Your respondent above named, a corporation duly organized, created and existing under and by virtue of the laws of the State of New York, is a claimant in the above entitled limitation proceedings and has heretofore duly filed its appearance and verified claim with Godfrey Updike, Esq., who has been appointed by this Court as the Commissioner in these proceedings before whom proof of all claims shall be presented.

Second: Your respondent admits the truth of the allegations contained in the First Article of the petition.

Third: Your respondent admits that at all times mentioned in the petition the petitioner, Kawasaki Kisen Kabushiki Kaisha, was, and now is, a corporation organized under the laws of the Empire of Japan with its head office at Kobe, Japan.

Your respondent denies any knowledge or information sufficient to form a belief as to the truth of the other allegations contained in the Second Article of the petition and calls for strict proof thereof, if the same be deemed material.

[fol. 32] Fourth: Your respondent admits that the steamship "Venice Maru" is a steel freight steamship of the Three Island type with raised forecastle and poop and that it has six cargo hatches, each leading to upper and lower 'tween decks and lower holds; that Nos. 1, 2 and 3 hatches are forward of the engine room and Nos. 4, 5 and 6 hatches are aft.

Your respondent specifically denies that each of the cargo spaces on the "Venice Maru" was, at all times mentioned in the petition, furnished with an adequate number of metal ventilators extending to the weather deck of the vessel which were maintained in good order and condition and that the petitioner used due diligence to make said vessel seaworthy and that until the fire mentioned in the petition occurred she was tight, staunch, strong, fully manned, equipped and supplied and in all respects seaworthy and fit for the service in which she was engaged, as is alleged in the Third Article of the petition.

Your respondent denies any knowledge or information sufficient to form a belief as to the truth of each and every other allegation contained in the Third Article of the petition and calls for strict proof thereof if the same be material.

Fifth. Your respondent admits that in July of 1934, the "Venice Maru," loaded with general cargo which she had taken aboard at Dairen, Shanghai, Kelung, Kobe, Nagoya, Shimizu and Yokohama left Yokohama, Japan, bound for New York, via Los Angeles and the Panama Canal; that she carried wood oil in bulk in her deep tanks located in lower hold No. 4, raw silk in the silk rooms in Nos. 2 and 5 'tween decks, sardine meal in bags in lower hold No. 1, lower hold No. 3, lower 'tween decks No. 3 and in lower hold No. 6; that her other compartments were loaded with general cargo, including tea, canned goods, cotton goods, wool, porcelain, toys, bamboo poles, etc.; a fire occurred on board said vessel while en route from Los [fol. 33] Angeles to Balboa; that subsequently the petitioners *ap*appointed Messrs. Johnson & Higgins as average adjusters; that security was taken from the sound cargo to cover its proportion of the alleged general average; that some damaged cargo was removed from the ship in the Canal Zone; that some of the damaged cargo, including certain of the fish meal in No. 1 lower hold, was ordered destroyed by the Panama Canal Health Authorities and some was left on dock at Panama Canal and later transshipped to destination; that on or about August 28th, the vessel left Balboa and proceeded through the Canal and arrived at Cristobal; and that after discharging certain cargo at Cristobal she sailed for New York where she arrived on or about September 5, 1934, at which port she

discharged certain of her cargo and then proceeded to Philadelphia and other Atlantic ports to discharge further cargo.

Your respondent specifically denies that the steamship "Venice Maru" on the voyage in question was under the command of a competent and experienced master and was manned by competent and experienced officers and crew and her cargo was well and properly stowed; that on the voyage due care was given to the ventilation of the cargo and that whenever weather permitted one-third of the hatch boards covering the hatches were removed for the purpose of ventilation; and that the said vessel was in good order and condition when she sailed from Los Angeles, as is alleged in the Fourth Article of the petition.

Your respondent denies any knowledge or information sufficient to form a belief as to the truth of each and every other allegation contained in the Fourth Article of the said petition and calls for strict proof thereof, if the same be material.

Sixth: Your respondent admits that as a result of the fire occurring on board the steamship "Venice Maru" during the course of the voyage referred to in the petition herein and as a result of the steps taken to extinguish it, [fol. 34] a large amount of the cargo being carried on the said vessel was damaged or destroyed.

Your respondent denies any knowledge or information sufficient to form a belief as to the truth of each and every other allegation contained in the Fifth Article of the petition herein and calls for strict proof thereof, if the same be material.

Seventh: Your respondent denies the truth of each and every allegation contained in the Sixth Article of the petition herein.

Eighth: Your respondent denies the truth of each and every allegation contained in the Seventh Article of the petition herein.

Ninth: Your respondent admits that at the time of the filing of the petition, the petitioners did not know the amount of claims for loss, damage and destruction sustained by cargo on the voyage referred to in the petition herein; that prior to the filing of the petition, proceed-

ings had been begun against the petitioner, Kawasaki Kisen Kabushiki Kaisha, and/or the steamship "Venice Maru" for damages sustained by reason of the matters alleged in said petition as set forth in Schedule A annexed to said petition and that in addition to the proceedings referred to in said Schedule A, a number of claims or notices of claims had been presented to the petitioners for loss of or damage to cargo.

Your respondent denies any knowledge or information sufficient to form a belief as to the truth of each and every other allegation contained in the Eighth Article of the petition herein and calls for strict proof thereof if the same be material.

Tenth: Your respondent denies any knowledge or information sufficient to form a belief as to the truth of each [fol. 35] and every allegation contained in the Ninth Article of the petition herein and calls for strict proof thereof, if the same be material.

Eleventh: Your respondent admits that the steamship "Venice Maru" was damaged in the fire and the steps to extinguish the fire.

Your respondent denies any knowledge or information sufficient to form a belief as to the truth of each and every other allegation contained in the Tenth Article of the petition herein and calls for strict proof thereof, if the same be material; and your respondent further begs leave to further answer the said allegations in the Tenth Article of the petition upon receiving definite information with respect to the value of the steamship "Venice Maru" and with respect to the amount of her pending freight.

Twelfth: Your respondent specifically denies that the petitioners are entitled to claim exemption from liability for the loss, damage and destruction occasioned or incurred by or resulting from the fire mentioned in the said petition and the steps taken to extinguish said fire and/or subsequent damages and for the claims for damages that have been or may be hereafter made and that the petitioners have valid defenses thereto on the facts and on the law and under the provisions of the contracts for the carriage of the cargo, and that the petitioners are entitled to claim the benefit of the limitation of liability provided in Sections 4281, 4282, 4283, 4284, 4285 and 4286 of the

Revised Statutes of the United States and the various statutes supplemental thereto and amendatory thereof, as is alleged in the Eleventh Article of the petition.

Your respondent denies any knowledge or information sufficient to form a belief as to the truth of each and every other allegation contained in the Eleventh Article of the petition and calls for strict proof thereof, if the same be material.

[fol. 36] Thirteenth: Your respondent admits the admiralty and maritime jurisdiction of the United States and of this Honorable Court, but specifically denies that all and singular the premises of the petition are true, as is alleged in the Twelfth Article of the said petition.

Further answering the petition, your respondent alleges as follows:

Fourteenth: During the months of June and July, 1934, various shipments of merchandise, then in good order and condition, were delivered to the petitioner, Kawasaki Kisen Kabushiki Kaisha, and were thereafter shipped and placed on board the steamship "Venice Maru" for carriage from various Far Eastern ports to various American and Latin-American ports where the said merchandise was to be delivered in like good order and condition as when shipped, in consideration of an agreed freight and in accordance with the valid terms of certain bills of lading duly issued by the petitioner, Kawasaki Kisen Kabushiki Kaisha, and/or by the duly authorized agents or representatives of the said petitioner and of the aforesaid steamship "Venice Maru" to cover the said merchandise.

Fifteenth: Thereafter, the said steamship "Venice Maru," having the said merchandise on board, sailed from the respective ports of shipment and subsequently arrived at the respective ports of discharge where the said steamship "Venice Maru" discharged the said shipments, but not in like good order and condition as when delivered to the said vessel and to the said petitioner, Kawasaki Kisen Kabushiki Kaisha, at the said ports of shipment, but short, slack, broken and seriously injured and damaged and otherwise not in like good order and condition as when shipped and/or that a portion or the whole of some of said shipments has not been delivered to the owners thereof and/or

[fol. 37] to the claimants herein at the ports of discharge named in the bills of lading or at any other port.

Sixteenth: That despite the fact that the bills of lading issued by the petitioner, Kawasaki Kisen Kabushiki Kaisha, and/or by the duly authorized agents and representatives of the said petitioner and of the said steamship "Venice Maru" to cover the shipments made at Nagoya and/or at Yokohama were all clean bills of lading and contained no special provisions, providing for or allowing stowage of the cargo on deck, certain shipments of chinaware, curios and porcelain which were shipped on board the steamship "Venice Maru" at Nagoya, Japan, and/or at Yokohama, Japan, were stowed and carried on the voyage in question as deck cargo.

Seventeenth: The breach of the aforesaid contracts of affreightment and the loss, injury and damage sustained by the shipments above referred to were not caused or contributed to by any fault of neglect of the shippers of the said cargo or the claimants in this proceeding, but were wholly due to the fault, neglect and want of care of the petitioners in the proper stowage, care and custody of the said cargo and/or in furnishing a seaworthy vessel for the transportation of said cargo.

Eighteenth: Prior to the arrival of the steamship "Venice Maru" at the ports of discharge named in the respective bills of lading, the claimants in this proceeding became the owners of the merchandise above referred to and also became the owners and holders for value of the bills of lading covering the said merchandise and thereby became entitled to the delivery of the said merchandise in like good order and condition as when delivered to the petitioner, Kawasaki Kisen Kabushiki Kaisha, and to the said steamship "Venice Maru" for carriage as aforesaid.

[fols. 38-48] Nineteenth: The claimants in this proceeding and/or their agents have duly performed all valid terms and conditions of the contracts of carriage on their part to be performed.

Twentieth: All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore your respondent, on its own behalf, and on behalf of all other claimants similarly situated, prays that

the claims filed herein be allowed; that the petition filed herein be denied; and that this Court will grant such other and further relief as may be just and proper in the premises.

Bigham, Englar, Jones & Houston, Proctors for Claimants, Office and P. O. Address, No. 99 John Street, New York City.

(Verified by James Tasley, as President of Consumers Import Co., Inc., one of the claimants, on December 28, 1934.)

[fols. 49-56] IN UNITED STATES DISTRICT COURT

INTERROGATORIES ATTACHED TO CLAIMANTS' ANSWER TO THE PETITION FOR LIMITATION AND SWORN ANSWERS THERETO BY Y. KAWASAKI, MANAGING DIRECTOR OF THE PETITIONER, KABUSHIKI KAISHA KAWASAKI ZOSENJO.

First Interrogatory: What, if any, general or special instructions or recommendations with respect to the manner or method of stowage and ventilation of sardine meal or fish scraps did the petitioners give to the master and/or other officers of the steamship "Venice Maru" at any time prior to the sailing of the steamship "Venice Maru" from Kobe on the voyage referred to in the petition herein as beginning at Yokohama on July 13, 1934.

Ans. Under the fleet bareboat charter which included the "Venice Maru," the petitioner, Kabushiki Kaisha Kawasaki Zosenjo, had nothing to do with the operation of that vessel or instructions to her Master. The vessel was operated, manned, victualed and navigated by the petitioner, Kawasaki Kisen Kabushiki Kaisha who appointed the Master.

Answers to Second to Eighty-first Interrogatories, inclusive. The petitioner, Kabushiki Kaisha Kawasaki Zosenjo, has no knowledge or information relating to these interrogatories as the vessel was bareboat chartered to Kawasaki Kisen Kabushiki Kaisha during this period and said charterer operated, manned, victualed and navigated her.

[fols. 57-58] IN UNITED STATES DISTRICT COURT

SUMMARIES OF STIPULATIONS OF FACT

Prior to the trial of this action, proctors for the petitioners and proctors for cargo claimants entered into certain stipulations of fact. The following are summaries of such stipulations:

A. Claimant, George Borgfeldt Corp., a New York corporation, was at all material times the owner and holder for value of the bill of lading issued by petitioner, Kawasaki Kisen Kabushiki Kaisha, to cover a shipment of 114 cases of earthenware received on board the steamship "Venice Maru" in apparent good order and condition for carriage from Nagoya to Baltimore. The said shipment was on board the steamship "Venice Maru" when she sailed from her Japanese ports of loading on the voyage referred to in the petition herein and was still on board said vessel at the time fire broke out in her No. 1 lower hold on or about August 6, 1934. Upon discharge at Baltimore the aforesaid shipment outturned ex the steamship "Venice Maru" not in like good order and condition as when shipped, but seriously injured and damaged by reason of contact with water and steam. Said claimant has duly performed all valid conditions precedent contained in the bill of lading on its part to be performed.

* * * * * * *

[fol. 59] D. Claimants, Consumers Import Co. (a New York corporation), Albert B. Baker and William L. Bradley, copartners, trading under the firm name and style of Bradley & Baker, Charles M. Cox Co. (a Massachusetts corporation), and A. E. Buck, H. V. B. Smith, C. D. Rafferty and H. C. McCormick, copartners, trading under the firm name and style of H. J. Baker & Bro., were at all material times respectively the owners and holders for value of the respective bills of lading issued by petitioner, Kawasaki Kisen Kabushiki Kaisha, to cover the various shipments of sardine meal hereafter described. Said shipments were shipped in apparent good order and condition on board the steamship "Venice Maru" at Kobe by Mitsubishi Shoji Kaisha, Ltd. The quantity of sardine meal comprising the shipments referred to and the respec-

tive ports of discharge named in the bills of lading were as follows:

[fol. 60]

Item	*Merchandise*	*Port of Discharge*
1	2,000 bags sardine meal, said to weigh 200,000 pounds, marked CICO	New York
2	5,500 bags sardine meal, said to weigh 550,000 pounds, marked MTC	Boston
3	2,000 bags sardine meal, said to weigh 200,000 pounds, marked MTC	New York
4	10,000 bags sardine meal, said to weigh 1,000,000 pounds, marked MTC	Jacksonville
5	1,000 bags sardine meal, said to weigh 100,000 pounds, marked MTC	New York
6	500 bags sardine meal, said to weigh 50,000 pounds, marked FOXCO	Philadelphia

According to the stowage plan of the steamship "Venice Maru" for the voyage referred to in the petition herein, the aforesaid shipments were stowed as follows:

(a) In #1 Lower Hold, the entire shipment of 2,000 bags identified above as Item #1, together with 4,805 bags from the shipment identified above as Item #2, 492 bags from the shipment identified above as Item #3, and 6,015 bags from the shipment identified above as Item #4, making a total of 13,312 bags of sardine meal stowed in that compartment.

(b) In #3 Tweendecks, 453 bags from the shipments identified above as Items #3 and #5 together with the entire shipment of 500 bags identified above as Item #6 and 5,116 bags marked N. M. consigned to [fols. 61-616] Hamburg, making a total of 6,069 bags of sardine meal stowed in that compartment.

(c) In #3 Lower Hold, 11,884 bags marked N. M. consigned to Hamburg.

(d) In #6 Lower Hold, 695 bags from the shipment described above as Item #2 together with 2,055 bags from the shipments described above as Items #3 and #5, and 3,985 bags from the shipment described above as Item #4, making a total of 6,735 bags of sardine meal stowed in that hold.

The aforesaid shipments were on board the steamship "Venice Maru" when she sailed from her Japanese ports of loading on the voyage referred to in the petition herein and were still on board said vessel at the time fire broke out in her No. 1 lower hold on or about August 6, 1934. The 2,000 bags comprising the entire shipment identified above as item No. 1, 4782 bags of the shipment identified above as item No. 2, 568 bags of the shipment identified above as item No. 3, and 6,238 bags of the shipment identified above as item No. 4, were never delivered by the steamship "Venice Maru" or by Kawasaki Kisen Kabushiki Kaisha to the shipper or to the owners thereof at the ports of discharge named in the bills of lading issued to cover the said shipments or at any other port. Whatever portions of the aforesaid shipments which were not delivered as aforesaid were either destroyed by the fire which broke out on the steamship "Venice Maru" on or about August 6, 1934, or were discharged from the said vessel at the Canal Zone in such a badly damaged condition, due to contact with water or steam, that they were dumped at that place as worthless. The shipments identified above as items 5 and 6 were delivered by the steamship "Venice Maru" in good order and condition at the ports of discharge named in the bills of lading issued to cover the same. Claimants above named have duly performed all valid conditions precedent contained in the bills of lading on their part to be performed.

* * * * * * *

[fol. 617] In United States District Court

Excerpts from Statement of Evidence

Shotaro Kitamura, called as a witness on behalf of the petitioners, being first duly sworn testified as follows:

(Toasimaro Imai was duly sworn to act as interpreter.)

(The questions were asked and the answers given in English unless otherwise noted.)

Direct examination.

By Mr. Sprague:

(The witness is requested to call for the interpreter if he does not understand a question or does not know how to properly answer a question.)

Q. Mr. Kitamura, where do you reside?

A. Kobe.

Q. Japan?

A. Japan.

[fol. 618] Q. Are you employed by Kawasaki Kisen Kabushiki Kaisha, one of the petitioners?

A. Yes.

Q. How long have you been employed by Kawasaki Kisen Kabushiki Kaisha?

A. I have been employed since 1921 by Kawasaki Kisen Kabushiki Kaisha.

Q. You were first employed in 1921 as a clerk in the London office, were you?

A. Yes.

Q. And then in 1922 you were on leave of absence?

A. Yes, I had one year's absence in 1922.

Q. From 1923 to 1925 you were a clerk in the New York office?

A. Yes.

Q. From 1925 to 1930 you were in the Australian office at Sydney?

A. Yes.

Q. And from 1930 to 1932 you were in the Shanghai office of your company?

A. Yes.

Q. From 1932 to May, 1938, what was your position with the petitioner, Kawasaki Kisen Kabushiki Kaisha?

A. I was chief clerk of the foreign traffic department of Kawasaki Kisen Kabushiki Kaisha, Inc.

Q. What have you got there?

A. I have got notes.

Q. In your own handwriting?

A. Yes.

Q. As chief clerk of the foreign traffic department of Kawasaki Kisen Kabushiki Kaisha, what were your duties?

A. My duty as chief clerk was negotiating with shippers and soliciting freight, booking cargo or communicating with foreign agents in foreign countries, laying out new plans for new services or in connection with our ships carrying cargo to and from foreign countries.

Q. Did you have anything to do with the ships of your country that were engaged in the coastal service of Japan?

A. Oh, yes.

Q. Who was the general manager of your company?

A. At that time?

Q. Yes.

A. Mr. Okubo.

Q. And was he an officer of the company?

A. Yes.

Q. Who was the president of your company?

A. Mr. Hirao.

[fol. 619] Q. Were there any other officers of the company besides Mr. Okubo and Mr. Hirao?

A. No.

Q. Who were the other directors of the company besides Mr. Hirao and Mr. Okubo?

A. Mr. Itani, Mr. Kawasaki and Mr. Matsumura.

Q. Were they actively engaged in the business or not?

A. No.

Q. Were they managing directors?

A. The only managing director was Mr. Okubo.

Q. So these gentlemen, Mr. Kawasaki, Mr. Itani and Mr. Matsumura were not managing directors?

A. No.

By the Court:

Q. Were they active in business?

A. No, only ordinary directors.

Q. Did they have anything to do with the business?
A. No, they have nothing to do.

By Mr. Sprague:

Q. I show you Petitioners' Exhibit 16 and ask you if you have examined it and if you can state what it is (handing to witness)?
A. This is a copy of a contract.
Q. Of what contract?
A. The bare boat charter contract.
Q. Covering some ten different ships?
A. Yes, sir, covering the "Florida Maru," the "Belfast Maru," the "Wales Maru," the "Montreal Maru," the "Norfolk Maru," the "Venice Maru," the "Bordeaux Maru," the "India Maru," the "Oregon Maru," the "Thames Maru" and the "Shofuku Maru."
Q. And did that include the "Venice Maru"?
A. Yes, that included the "Venice Maru."
Q. Have you compared that with the original charter party and is this a true copy of the original?
A. Yes, I remember this copy of the original.
[fol. 620-632] Q. Was or was not Kawasaki Kisen Kabushiki Kaisha operating the "Venice Maru" under this charter party, Petitioner's Exhibit 16, in July, August and September, 1934?
A. Yes, it was.

The Court:

Q. Change the question. Is the Exhibit 17 that you have in your hand a correct translation of Petitioner's Exhibit 16?
A. I think so.

* * * * * * *

Q. Do you know Kabushiki Kaisha Kawasaki Zosenjo?
A. Yes.
Q. Who are named in this document of charter party, Petitioners' Exhibit 17?
A. I know.
Q. Is that the same company as the petitioner Kawasaki Kisen Kabushiki Kaisha?
A. A different company.

Q. Mr. Kitamura, who furnished the officers and crew and appointed the officers and crew of the "Venice Maru" in July, August and September, 1934?

A. Kawasaki Kisen Kaisha.

Q. That is the company by which you are employed?

A. Yes.

Q. Who paid all the expenses of the navigation of the ship during that time?

A. Kawasaki Kisen Kaisha.

Q. Who paid for the victualing of the crew at the time of this voyage in question?

A. Kawasaki Kisen Kaisha.

Q. When did your company open its New York service?

A. 1932.

. . . . . .

Q. Was fish meal being offered in Japan for transportation to New York at the time you first opened the New York service?

A. No.

Q. When did you first receive fish meal in Japan for shipment to New York?

A. It was spring in 1933.

Q. Before the spring of 1933 had your company carried fish meal in any other service?

A. Yes.

(Here follows 1 photolithograph, side folio 632a-1926)

U. S. Dist. Court,
S. D. of N. Y.

JUL 6 1938

U. S. Dist. Court
S. D. of N. Y.
JUL-6 1938

"K" LINE

No

KAWASAKI KISEN KAISHA

TRANS-PACIFIC SERVICE

THROUGH BILL OF LANDING

From

TO BE TRANSHIPPED

At

By Overland / By Water via Panama

SHIPPED in apparent good order and condition by shipper hereinafter mentioned, on board the vessel " under Japanese flag, belonging to, or employed by, THE KAWASAKI KISEN KAISHA, (hereinafter called Carriers), commanded by T. INOUYE or substitute for the present voyage or whomsoever else may be placed in command, the goods or packages of merchandise marked, numbered and described as per margin, (value, quantity, weight, measurement, gauge, quality, contents, and condition of contents unknown), to be conveyed, with such reasonable despatch as the general business of the carriers permit, from port of loading hereinafter mentioned unto port of discharge below named, or so near thereunto as safe navigation of such vessel shall then permit, always afloat and upon arrival at such port of discharge, to be delivered, in like good order and condition, unto party or parties named as Consignee in the margin of this bill of lading, or his or their assigns, when and where the vessel's and the carriers' liabilities shall cease, always under and subject to the exceptions and conditions expressed in this Bill of Lading.

Shippers

Port of Loading — Destination

Port of Transhipment

Consignee

Notify.

(Order Bill of Lading must show party to be notified, otherwise Carriers not responsible for delay and expense when effecting delivery.)

MARKS AND NUMBERS	PACKAGES	DECLARED CONTENTS	GROSS WEIGHT	CUBIC FEET
CICO New York 100 Lbs. Net Made in Japan	2000 Bgs.	Japanese Sardine meal	200000 Lbs.	
TOTAL	2000		200000 Lbs.	

MARKS AND NUMBERS	PACKAGES	DECLARED CONTENTS	GROSS WEIGHT	CUBIC FEET
CICC New York 100 Lbs Net Made in Japan	1000 Cs.	Japanese Sardine meal	200000 Lbs.	
TOTAL	1000		TOTAL 200000 Lbs	

ATTENTION OF SHIPPERS is particularly called to note that Goods of an inflammable or explosive or corrosive or otherwise dangerous or injurious nature shall be distinctly so marked as to indicate their character before shipment, and be transported, if the carriers choose, on deck or elsewhere, and they shall in all cases be at the shipper's or cargo owner's risk. If any such articles shall be delivered to the carriers without stating the character thereof and having the same distinctly and legibly marked upon the package or cans containing the same, the shippers shall be responsible for any damage to other cargo, the ship and/or others whatsoever caused by such goods, and such goods may be seized and confiscated or destroyed by the carriers, if deemed necessary, without incurring any liability therefor. All fines, expenses, losses or damage which the carriers or their agents or vessels, or the ship or cargo or other, whatsoever may incur or suffer on account of incorrect or insufficient marking of the packages, or description of their contents, or other failure to comply with customs regulations or by reason of the inflammable, explosive, corrosive, or otherwise dangerous or injurious nature of such contents, shall be borne by and be recoverable severally and jointly from the owner, shipper, or consignee, whether such owner, shipper or consignee shall be aware thereof or not.

It is mutually agreed that shipments hereon is subject to the regular charges at port of destination for wharfage, demurrage, etc., and it is further agreed that the goods must be removed from the wharf within three days after discharge, otherwise same will be placed in store at the risk and expense of consignee and/or owners of goods.

RATES, WEIGHTS AND/OR MEASUREMENTS SUBJECT TO CORRECTION				
FREIGHT & CHARGES				TOTAL
RATE	OCEAN	RATE	RAILWAY	FREIGHT & CHARGES
@ $8.00 per 2,240 lbs				714.29
FREIGHT PREPAID				
Exch. @				$ 714.29 ¥

IN WITNESS WHEREOF, the owners or Agents of the said vessel have signed ____ BILLS OF LADING, all of this tenor and date, one of which being accomplished the others to stand void. Dated at ____ this ____ day of ____

COPY NOT NEGOTIABLE

for Master

(Subject to conditions and exceptions as per overleaf)

IT IS MUTUALLY AGREED THAT THE GOODS ARE TO BE CARRIED UNDER THE FOLLOWING EXCEPTIONS AND CONDITIONS:

1.—The carrier may substitute, or tranship by any other or succeeding vessel, and the vessel with the goods on board, either before or after proceeding toward the port of discharge, may proceed to and stay at any ports or places whatever, although in a contrary direction to or outside of or beyond the usual route to the said port of discharge, once or oftener in any order, backwards or forwards, for loading, or discharging cargo, coal or passengers, or for any purpose whatsoever, and all such ports, places and sailings shall be deemed included within the intended voyage. This liberty is not to be considered as restricted by any words of this contract, whether written, stamped or printed. The vessel may adjust compasses, and dock and go on ways with or without cargo on board after commencing the voyage.

2.—The vessel may sail without pilots, tow and assist vessels in all situations and deviate for the purpose of saving life or property. In case the ship shall put into a port of refuge, or be prevented from any cause from proceeding in ordinary course of her voyage, the carrier may tranship and reship the goods to their destination by any other vessels or sailing vessels at the risk and expense of the goods.

3.—It is stipulated and agreed that [illegible] only so far as due care in the appointment or selection of Agents, Superintendents, Pilots, Masters, Officers, Engineers and Crew have secured or may secure it. The carrier shall not be liable for loss or damage occasioned by, due to or arising from causes beyond the carrier's control, by the act of God, perils of the sea or other waters, and of navigation, by collision, stranding, jettison or wreck; by fire from any cause or whensoever occurring, on board, in craft or on shore; by fault or barratry of the master or crew or other servants of the shipowner; by enemies, pirates, robbers, thieves by land or sea; by theft by any person on board, in craft, or on shore, whether in the employ of shipowner or not; by arrest or restraint of princes, rulers or people; delay, detention or unavoidable deviation arising out of or consequent upon the employment of any vessel in the mail or any special service of Government, [illegible]

[illegible]

4.—General average to be adjusted at Kobe and shall be payable according to York-Antwerp Rules, 1924 [illegible]

[illegible]

5.—The shipper shall be liable for any loss or damage [illegible]

[illegible]

6.—The carrier shall have a lien on the goods for all freight, dead freight, demurrage [illegible]

[illegible]

7.—In addition to the liens hereinbefore provided, the Carrier shall have a lien on the goods [illegible]

[illegible]

8.—If the ship is prevented by Quarantine [illegible]

[illegible]

9.—In case of war, [illegible] give rise to risk of capture, seizure or detention of vessel and/or cargo, or of any part of the cargo, or which in his, or their, judgement may make it unsafe or imprudent for any reason to proceed on or continue the voyage, or enter or discharge cargo at the port of discharge, or which in his or their, judgement is likely to give rise to delay or difficulty in reaching, discharging at or leaving the port of discharge, the Master shall be at liberty, in his discretion, to proceed or return to or stop and discharge the cargo, or any part thereof, at such other port or ports as he may consider safe or advisable, under the circumstances, and thereupon when so landed, the cargo shall be at the risk and expense of the shipper and owner, consignee and holder of this bill of lading, and the vessel, her owners, Agents and Master shall be freed and discharged from any responsibility whatsoever in respect therefor.

10.—The vessel may commence discharging immediately on arrival and discharge continuously without regard to weather, any custom of the port to the contrary notwithstanding; carrier is not and shall not be required to deliver said merchandise at port of discharge at any particular time or to meet any particular market or in time for any particular use; and shipper shall notify consignee or other person or forwarder or Carrier at place of delivery to there receive said merchandise as discharged at ship's tackle, and said merchandise may be discharged immediately on arrival of vessel at port or wharf or landing without regard to weather. If consignee be not on hand to so receive packages as discharged, Carrier may deliver same to any lighterman or wharfinger or other party or person believed by Carrier to be responsible and who will take charge of said packages, or the same may be kept on board or be landed on wharf or beach or hulk or stored in hulks or put in lighters at the risk and expense of the goods.

11.—All expenses for cooperage, reconditioning and gathering of loose cargo and contents of packages shall be paid by the owner, shipper or consignee of the cargo and shall constitute a lien thereon.

12.—If, on the arrival of the vessel at the port delivery, any of the bales or packages shipped under the Bill of Lading cannot be identified by reason of insufficiency of marks, obliteration of marks, or no marks, then, in any such case, the Shipper, Carrier, Consignee or Holder of the Bill of Lading shall take in full discharge, accord and satisfaction any bale or packages which may be on board the steamer and be tendered them by the Carrier or their Agents, notwithstanding that such bales or packages do not bear the marks and description indicated in the margin overleaf. Optional cargo must be declared [illegible] before ship's arrival at the first port of ship's call where the cargo has to be landed, or it will be carried on port to port to the final destination of ship to which option extends.

13.—In case any part of the within goods cannot be found during Ship's stay at port of destination, [illegible]

[illegible]

14.—[illegible]

[illegible]

15.—[illegible]

[illegible]

16.—[illegible]

[illegible]

17.—[illegible]

[illegible]

18.—[illegible]

[illegible]

19.—The vessel has the privilege to carry general cargo [illegible]

[illegible]

20.—[illegible]

[illegible]

21.—If any [illegible]

[illegible]

22.—No claim shall, under any circumstances whatever, attach to the Carrier for failure to notify consignee or others of the arrival of the Goods.

23.—[illegible]

[illegible] FREIGHT ON ALL DECK CARGO MUST BE PREPAID. The shipowner is to have a lien for freight on all goods, whether freight intended to be payable in advance or not.

24.—In the event of loss or damage to the goods in whole or in part during transit; or in case the goods or part thereof shall be left at a port of refuge or call on account of damage occasioned by excepted perils or because of general average damage, full freight as specified in the bills of lading shall be considered earned and shall be payable without deduction by the shipper, owner and/or consignee and there shall be a lien on the portion of the cargo delivered for the full freight.

25.—The contract for the shipment under this bill of lading, wherever made, to be construed and governed by Japanese Law, and further is subject to all the provisions of Sections 4281, 4282, and 4283 of the Revised Statutes, of the Act of Congress of the United States approved on February 13, 1893, and entitled "An Act Relating to Navigation of Vessels, etc." and of Section 502 of the British Merchant Shipping Act.

thereior.

7.—In addition to the liens hereinbefore provided, the Carrier shall have a lien on the goods for all expenses, fines, liabilities, and damages which the Carrier, vessel, or cargo may suffer through any illegal or improper act of shippers, consignees or owners of goods; as well as for all other sums due from goods, shipper, owner or consignee of Goods to the Carrier. All liens to which the Carrier is entitled by law, or under this bill of lading shall continue after delivery of the Goods until satisfied; and the shipper, owner of goods and/or consignee shall be liable severally and/or jointly for the amount thereof.

8.—If the ship is prevented by Quarantine from reaching her destination, or making due delivery of the goods, or is detained at quarantine, the goods may be forthwith, without previous notice to shipper, owner, or consignee, discharged into depots, lazarettos, hulks, crafts or lighters, at the risk and expense of shipper, owner and consignee, all and any of them, and such discharge shall be deemed a full and final delivery of the goods, all risk, responsibility and expenses of the Carrier thereafter, as carrier, bailee or otherwise, ending as soon as the goods are delivered from the ship's tackle, and all expenses thereby or thereafter incurred, and all increased cost of such delivery shall be paid by shipper, owner and consignee, all and any of them, the Carrier retaining a lien on the goods therefor; but should the vessel or goods not be admitted, or such discharge be impracticable, or so in the master's opinion, the Carrier may forthwith, without previous notice, proceed to the nearest safe port, or at ship's option, to the nearest safe port to which the ship is bound, at the risk and expense of shipper, owner and consignee, all and any of them, and there land the goods as if at the original port of discharge, at the risk and expense of shipper, owner and consignee, all and any of them, he and they paying freight from the original port of discharge, and the Carrier retaining a lien on the goods therefor and for [illegible], charges and expenses incurred, and for all [illegible] cost of delivery. Collectors of Customs are hereby authorized to grant a general order of discharge immediately the ship be entered at custom house.

9.—In case of war, hostilities, [illegible], civil commotion, strikes or lock-outs, disturbances, blockade or interdict of the port of discharge, warlike or naval operations or demonstrations, whether at or near the port of discharge, or elsewhere in the course of the voyage, or of ice or closure by ice or of the happening of any other matter or event, whether of the nature to those above mentioned or otherwise, and whether existing or anticipated before commencement of or during the voyage, which in the judgment of the Master or Carrier or Agent is likely to result in damage to or loss of the vessel or give rise to risk of capture, seizure or detention of vessel and/or cargo, or of any part of the cargo, or which in his, or their, judgment may make it unsafe or imprudent for any reason to proceed on or continue the voyage, or enter or discharge cargo at the port of discharge, or which in his or their, judgment is likely to give rise to delay or difficulty in reaching, discharging at or leaving the port of discharge, the Master shall be at liberty, in his discretion, to proceed or return to or stop and discharge the cargo, or any part thereof, at such other port or ports as he may consider safe or advisable, under the circumstances, and thereupon when so landed, the cargo shall be at the risk and expense of the shipper and owner, consignee and holder of this bill of lading, and the vessel, her owners, Agents and Master shall be freed and discharged from any responsibility whatsoever in respect thereto.

10.—The vessel may commence discharging immediately on arrival and discharge continuously without regard to weather, any custom of the port to the contrary notwithstanding; carrier is not and shall not be required to deliver said merchandise at port of discharge at any particular time or to meet any particular market or in time for any particular use; and shipper shall notify consignee or other person or forwarder or Carrier [illegible] damage.

19.—The vessel has the privilege to carry general cargo including benzene oil and products of petroleum, spirits of turpentine, all kinds of chemical products and liquids in cases, barrels or packages, and also live stock on and/or under deck. Goods carried on deck shall be at the risk of the shippers, owners, and/or consignees thereof. The carrier or their agents shall not be held liable for any damage to the within cargo resulting from carriage or stowage with, or proximity to, or the effect of other cargo of whatever kind on board, unless the carrier is at fault for such carriage or stowage.

20.—Fish, fruits, vegetables and all the perishable cargo and glass, china, crockery or articles contained in glass or crockery, or castings or any articles whatever of fragile nature or all unboxed, uncrated or otherwise unprotected merchandise, furniture, machinery, vehicles and implements of any kind [illegible], are carried on board only at the risk of shippers, consignees or owners of goods.

21.—If any bagged or baled goods are landed slack or torn, the receiver and/or consignee shall accept such proportion of the sweepings as may be allotted by the vessel's agent, and the same shall be deemed full settlement of any claims for loss in weight. Vessel not responsible for landed weight in bags, or bales, torn, mended, or with weights below.

22.—No claim shall, under any circumstances whatever, attach to the Carrier for failure to notify consignee or others concerned of the arrival of the Goods.

23.—Transhipment of cargo for ports where the ship does not call, or for dispatcher's purposes, to be at dispatcher's expense, but always subject to conditions required by vessels or railroad completing the transit, and at the risk of the owners of the goods after delivery from ship's tackle, where ship's responsibility shall cease. Goods to be forwarded as soon as practicable, but dispatchers not to be liable for detentions, and risk of warehousing to be borne by shipper, owner and consignee. All goods destined for ports or places beyond vessel's destination are subject to all conditions, stipulations and exceptions expressed in the customary form of Bill of Lading or Freight Note in use at the time of shipment by carrier completing the transit, and the dispatcher shall not be deemed to be the Agent, nor be liable as such for any events, acts or [illegible] happening to the said goods while the same are not in actual possession of the ship.

24.—Freight, whether prepaid or not, is to be considered earned and irrevocable on shipment of the goods, and is to be retained by the vessel's owners, whether vessel or cargo lost or not lost, or if there be a forced interruption or abandonment of the voyage at a port of distress or elsewhere, even though the cargo or part of it be forwarded. In the latter event, the goods shall be at the risk of, and the expense of forwarding shall be payable by, shipper, or consignee of the goods, and the said expense shall constitute a lien on the goods. **FREIGHT ON ALL DECK CARGO MUST BE PREPAID.** The dispatcher is to have a lien for freight on all goods, whether freight reserved be payable in advance or not.

25.—In the event of loss or damage to the goods in whole or in part during transit, or in case the goods or part thereof shall be left at a port of refuge or call on account of damage sustained by excepted perils or because of general average damage, full freight as specified in the bill of lading shall be considered earned and shall be payable without deduction by the shipper, owner and/or consignee and there shall be a lien on the portion of the cargo delivered for the full freight.

26.—The contract for the shipment under this bill of lading, wherever made, to be construed and governed by [illegible] Law, and further is subject to all the provisions of Sections [illegible], [illegible], and [illegible] of the Revised Statutes, of the Act of Congress of the United States, approved on February 13, 1893, and entitled "An Act Relating to Navigation of Vessels, etc." and of Section [illegible] of the British Merchants Shipping Act.

RAILWAY CLAUSES 1.—No Rail carrier in possession of the property herein described shall be liable for any loss thereof, or damage thereto, or delay caused by the Act of God, the Public Enemy; Quarantine, the authority of law, or the act of default of the shipper or owner, or for differences in the weights of grain, seed, or other commodities caused by natural shrinkage or discrepancies in elevator weights. 2.—Except in the case of negligence of the Rail carrier in possession and the burden to prove freedom from such negligence shall be on the Rail carrier in possession, the Rail carrier in possession shall not be liable for loss, damage, or delay occurring while the property described herein is stopped and held in transit upon request of the shipper, owner, or party entitled to make such request, or resulting from a defect or vice in the property, or from riots, or strikes. 3.—When in accordance with general custom, on account of the nature of the property, or when at the request of the shipper the property is transported in open cars, the carrier or party in possession (except in the case of loss or damage by fire, in which case the liability shall be the same as though the property had been carried in closed cars), shall be liable only for its negligence, and the burden to prove freedom from such negligence shall be on the Rail carrier in possession. 4.—No Rail carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable despatch, unless by specific agreement indorsed hereon. The rail carrier herein shall have the right in case of physical necessity to forward said property by any railroad or route between the port of discharge and the point to which the rate is given; but if such diversion shall be from a rail to a water route the liability of the carrier shall be the same as though the entire carriage were by rail. 5.—No Rail carrier shall be liable for loss, damage, or injury not occurring on its own road, or its portion of the through route, or after said property has been delivered to the next carrier except such liability as may be imposed bylaw. 6.—The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to the consignee, including the freight charges if prepaid), at the place and time of shipment under this Bill of Lading, unless a lower value has been presented in writing by the shipper, or has been agreed upon, or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such compensation whether or not such loss or damage occurs from negligence. 7.—Claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after delivery of the property, or, in case of failure to make delivery then within three months after a reasonable time for delivery has elapsed. Unless claims are so made the carrier shall not be liable. 8.—Any Rail carrier liable on account of loss of or damage to any of said property shall, by right of subrogation, have the full benefit of any insurance that may have been effected upon or on account of said property. 9.—All property shall be subject to necessary cooperage and baling at owner's cost. 10.—Property destined to a station, wharf, or landing where there is no regularly appointed agent shall be entirely at the risk of the owner after being unloaded from the cars or vessels, and when delivered on private or other sidings, wharves, or landings, shall be at the owner's risk after the cars are detached from the trains. 11.—No Rail carrier will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specially rated in the published classification or tariffs, unless special agreement to do so and a stipulated value of the articles are indorsed herein. 12.—Every party, whether principal or agent, shipping explosive or dangerous goods without previous full written disclosure to the carriers of their nature, shall be liable for all loss or damage caused thereby, and such goods may be warehoused at owner's risk and expense, or destroyed without compensation. 13.—The owner or consignee shall pay the freight and all other lawful charges accruing on said property, and if required shall pay the same before delivery. If upon inspection, it is ascertained that the articles shipped are not those described in this Bill of Lading the freight charges must be paid upon the articles actually shipped. 14.—Except in case of diversion from a rail to a water route, which is provided for in sections 4 hereof, if all or any part of said property is carried by water over any part of said route, such water carriage shall be performed subject to the liabilities, limitations and exemptions provided by statute and to the conditions contained in the Bill of Lading not inconsistent with such statute or this section, and subject also to the condition that no carrier or party in possession shall be liable for any loss or damage resulting from the perils of the lake, sea, or other waters, or from explosion, bursting of boilers, breakage of shafts, or any latent defects in hull, machinery or appurtenances; or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And any vessel carrying any or all of the property herein described shall have the liberty to call at the intermediate port to tow and be towed, assist vessels in distress and deviate for the purpose of saving life or property. The term "water carriages" in this section shall not be construed as including lighterage across the rivers or in lakes or other harbours and the liability for such lighterage shall be governed by the other sections of this instrument. 15.—Property not removed by the party entitled to received it within fortyeight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot or place of delivery of the carrier, or warehouse, subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only, or may be, at the option of the carrier, removed to and stored in a public or licensed warehouse at the cost of the owner and there held at his owner's risk and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage. The carrier may make a reasonable charge for the detention of any vessel or car, or for the use of tracks after the car has been held forty eight hours (inclusive of legal holidays) for loading or unloading, and may add such charge to all other charges hereunder and hold such property subject to a lien therefore. Nothing in this section shall be construed as lessening the time allowed by law or as setting aside and local rules affecting car service or storage. 16—Railway transit subject to laws of the United States of America, or Canada.

632-B

[fol. 1927] PETITIONERS' EXHIBIT 17

Translation of charter party covering S. S. "Venice Maru" as made by Mr. Fujino.

Bare Boat Charter Party

of FLORIDA MARU and ten other Steamers

On the first day of June, the 8th year of Showa (1933) bare boat charter was signed between Kabushiki Kaisha Kawasaki Zosenjo the owners of Japanese boat Florida Maru and ten other steamers, (hereafter simply called the owners) and the charterers Kawasaki Kisen Kabushiki Kaisha (hereafter simply called the Charterers) under the following terms and conditions:

Article No. one. The owners deliver to the charterers Florida Maru and the following ten other steamers at twelve A. M. on the first day of June, the 8th year of Showa, irrespective of their positions whether in voyage or in ports, in their respective actual state, equipment and conditions and leave them under the charterers operation and employment until the cancellation of the charter party is effective, after due advance notice of six months for cancellation was given by either party and mutual negotiation was made there upon.

The following boats:

Names	Gross tons	Dead weight tons
Florida Maru	5845.47	9114.3
Belfast Maru	6586.40	9923.2
Wales Maru	6586.40	9750.0
Montreal Maru	6576.52	9946.4
Norfolk Maru	6576.17	9728.8
Venice Maru	6571.25	9727.8
Bordeaux Maru	6566.53	9810.8
India Maru	5872.89	9074.9
Oregon Maru	5872.89	9037.6
Thames Maru	5871.00	9084.0
Shofuku Maru	1771.64	2597.7

[fol. 1928] Article No. two. The charterers, at their own risk and expense carry all the business of these steamers' operations, such as appointments, dismissals of officers and

crew also direction and supervision of operations and repairings of steamers, provision of stores and supply of all consumption materials or any other matter connected with operation of transportation.

Article No. three. The charterage to be negotiated and settled between the owners and the charterers every half yearly.

From twelve A. M. on the first day of June, the 8th year of Showa for the half year, that is until the end of November the 8th year of Showa, the charterage for Florida Maru and nine other steamers, excluding S. S. Shofuku Maru against total dead weight tons of 95197.8 to be at the rate of fifty five sen per dead weight ton, per calendar month.

For Shofuku Maru D.W.T. 2597.1 charterage to be at the rate of thirty sen, on the same basis as afore mentioned.

Thereafter, the charterage to be settled for the succeeding half year, one month before the expiration, after considering situation of the shipping market and after frank, earnest negotiating endeavored between the owners and the charterers. The charterage for less than one month to be charged for number of days by per day basis and by hours for less than one day.

Article No. four. From the time of commencement to the time of expiration of this charter party the charterers to pay the owners the charterage specified in Article No. three, each month, in cash, divided into two, on the first and sixteenth of each corresponding month covering each half month.

Article No. five. The charterers to take over the present insurance policies as they are, with clauses covering [fols. 1929-1970] salvage expenses against total loss for ship's hull, machinaries, boilers and accessory equipments and for part damages caused by general average and stranding, aground, fire, collision damage, sinking also 4/4 insurance policies with compensation clause against collision damages. But after expiration of these policies the insurance amount to be settled after the negotiation between the owners and the charterers. The compensation from the above mentioned policies belong to the charterers except in the case of total loss.

To certify this charter party, two original documents were made and each party holds one document with mutual signatures and seals affixed.

The first day of June, the 8th year of Showa for the owners. Yoshikuma, Kawasaki, Managing Director; Kabushiki-Kaisha Kawasaki-Zosenjo, No. 14 2-Chome, Higashi Kawasaki Machi, Koto-Ku, Kobe City. (Seal.)

For the charterers: Hachisaburo, Hirawo, Managing Director and President, Kawasaki Kisen Kabushiki Kaisha, No. 8 Kaigan Tori, Kobe-Ku, Kobe City. (Seal.)

. . . . . .

[fol. 1971] In United States District Court, Southern District of New York

Messrs. Crawford & Sprague, by George C. Sprague, Esq., and Roy Chamberlain, Esq., for Petitioners.

Messrs. Hill, Rivkins & Middleton, by Thomas H. Middleton, Esq., and Eugene P. McCue, Esq., for various Cargo Claimants.

Messrs. Hatch & Wolfe, by Carver W. Wolfe, Esq., and Roif T. Michelsen, Esq., for Seeman Brothers, Inc.

Messrs. Bigham, Englar, Jones & Houston, by T. Catesby Jones, Esq., and Ezra G. Benedict Fox, Esq., for various Cargo Claimants.

Opinion of Bondy, D. J.

Bondy, District Judge:

The petitioners Kabushiki Kaisha Kawasaki Zosenjo, owner and Kawasaki Kisen Kabushiki Kaisha, hereinafter referred to as the K Line, bareboat charterer of the steamship "Venice Maru," seek exoneration from or limitation of liability for cargo loss and damage arising out of a fire aboard the "Venice Maru."

July 5th, 1934, the "Venice Maru" with some general cargo aboard arrived at Kobe where the main offices of the petitioners were located. At Kobe more general cargo and

1900 tons of sardine meal in 38,000 bags were taken aboard, to be carried to Atlantic Coast ports in the United States via Panama Canal. Of the 38,000 bags, 13,312 were stowed in No. 1 lower hold, 11,884 in No. 3 lower hold, 6,735 in No. 6 lower hold and 6,069 in No. 3 tweendeck.

[fol. 1972] 1087 cases of porcelain goods were thereafter loaded on the weatherdeck at Nagoya and about 595 additional cases of porcelain goods were transferred from the ship's hold to the weatherdeck at Yokohama, from which the "Venice Maru" sailed July 13th, with all holds full and with 1682 cases on the weatherdeck covering most of the free deck space and the after two-thirds of No. 1 weather deck hatch. After encountering heavy rains which prevented as much ventilation as was anticipated to underdeck cargo, the "Venice Maru" arrived at Los Angeles July 29th, where 91 tons of cargo were discharged.

The "Venice Maru" left Los Angeles July 30th for Balboa with her weatherdeck and the after two-thirds of No. 1 weatherdeck hatch still covered by cargo. She encountered fine but hot weather.

Early in the morning of August 6th, smoke was observed coming out of the ventilators leading into No. 1 lower hold. Some of the bags of sardine meal stowed therein were found to be heating and giving off smoke. Notwithstanding efforts to control the situation the fire broke out, resulting in damage to and destruction of cargo by fire and water used to extinguish it.

The petitioners contend that the fire was caused solely by the inherent nature of the meal which rendered it unfit for transportation to the United States. The claimants contend that the fire was caused by negligent stowage of meal in too large a quantity in No. 1 lower hold without adequate means of ventilation for the long voyage from Kobe via Panama to New York and other Atlantic Coast ports of the United States.

The record discloses that the meal shipped in the "Venice Maru" consisted of Japanese sardine meal manufactured in Japan in the usual manner and that it was merchantable and fit for transportation by sea from Kobe to New York if properly stowed and ventilated. All analyses excepting only the analysis made by one of the shipper's competitors [fol. 1973] disclose that the moisture content of samples of the meal varied between 7.87% and 9.28%, and the oil con-

tent between 6.84% and 8.54%, well within the range of high grade Japanese sardine meal.

The meal was packed, as was usually done, in second-hand bags. Even assuming there was grain dust on some of the bags, the risk of spontaneous combustion was not thereby increased.

No. 1 lower hold, in which 13,312 bags were stowed, was a large cargo compartment, about 60 feet long, about 46 feet wide and from 20 to 23½ feet deep, with a tweendeck compartment 9½ feet deep and a shelterdeck compartment 8 feet deep above it. The meal was stowed in a substantially solid mass and occupied substantially the entire hold except a foot or two along the bulkheads and sides, and between the top of the cargo and overhead deck beams and a channel about one foot wide running athwartships through the middle of the stow. Five rows of rice ventilators extended fore and aft in the 5th, 10th, and 16th tiers of bags and six rows of such ventilators extended athwartships in the 6th, 11 and 17th tiers of the stow. These were connected with vertical rice ventilators placed at the four corners of the hatchway.

The permanent ventilating system of the "Venice Maru" was sufficient for the carriage of general cargo. Sardine meal, however, has been recognized as an hazardous cargo subject to heating and to spontaneous combustion. Properly stowed in small lots adequately ventilated it had been frequently carried safely by sea from Japan to the United States in tweendecks and in holds, notwithstanding its well known propensity to spontaneous combustion. Only a small quantity of the meal so shipped to the United States was better in quality than that shipped on the "Venice Maru." The variations that must have existed in the moisture and fat contents of the meal in the bags did not interfere with its safe transportation.

[fol. 1974] The K Line before the shipment in question had experience in the carriage of Japanese sardine meal from Japan to the Pacific Coast of the United States and to a lesser extent to the Atlantic Coast ports of the United States. It however experienced trouble from overheating of sardine meal on five of its vessels commencing with the voyage of the "Montreal Maru" sailing from Yokohama, September, 1933. In each case the overheating occurred after the vessels had left Los Angeles on their way to the Atlantic Coast

notwithstanding that rice ventilators had been used on two of these ships, the "Nichiyo Maru" and the "Tohsei Maru," both of which arrived in New York in May, 1934 before the "Venice Maru" had sailed from Japan.

The effect of the use of rice ventilators placed throughout the stow was unknown, uncertain and speculative. It may be of interest to note that some of the meal which was discharged at Balboa for ventilation was restowed on the "Venice Maru" and divided into small lots with channels between them in accordance with the block and channel method which came into general use in 1935, when it was realized that the experiments with rice ventilators proved unsatisfactory.

The evidence does not establish any custom or usage in the carriage of fish meal from Japan to Atlantic Coast ports which justified the stowing of 665.6 tons of fish meal, with or without rice ventilators, in a substantially solid mass so as almost to fill a lower hold.

I believe that the stowage of 665.6 tons of sardine meal in a substantially solid mass in the lower hold for the long voyage from Kobe to Atlantic Coast ports via the Panama Canal, constituted negligence and was a proximate cause of the fire in that even assuming that the rice ventilators were used in the manner claimed by the K Line, insufficient ventilation was provided. See *The Nichiyo Maru*, 14 Fed. Supp. 727, affirmed 89 Fed. (2nd) 529; *Cf. The Willfaro*, 9 Fed. (2d) 940, affirmed 9 Fed. (2nd) 662; and see *The Fern-*
[fol. 1975] *cliff*, 22 Fed. Supp. 728, in which a better system of rice ventilators apparently was resorted to.

The nature of sardine meal and the necessity of exposing a sufficiently large part thereof to circulating air have been so thoroughly considered by Judge Chestnut in the *Nichiyo Maru, supra*, and the *Ferncliff, supra*, that further reference thereto would not serve any useful purpose.

The K Line contends that it is exonerated from all liability because the loss and damage resulted from the fire not caused by its design or neglect. See Fire Statute, 46 U. S. C. A. 182.

The duty to stow cargo properly is considered delegable in determining whether there was design or neglect of the ship owner personally within the provisions of the Fire Statute. See *Earle & Stoddart* v. *Wilson Line*, 287 U. S. 420, 427. There was not any negligence in the delegation of the duty to plan and supervise the stowage of the

meal to Captain Fegen, an experienced Lloyd's Agent marine surveyor, well qualified to perform the service. *Cf. Flat-Top Fuel Company* v. *Martin*, 85 Fed. (2nd) 39, 42. His authority, however, was limited to supervision of meal stowage for the K Line at Kobe and to the giving of instructions to the masters with reference to such stowage. He was not a marine superintendent, general agent or managing officer of the K Line. He was simply an independent surveyor without power to control the movement, or crew of the ship, or to bind the K Line by contract. The negligent stowage of Captain Fegen was not, therefore, neglect of the owner personally, and does not deprive the K Line of its right to exoneration under the Fire Statute.

Prior to the loading of the "Venice Maru" the K Line had carried large quantities of meal on many occasions but the record does not disclose what, if any, part was stowed in the lower holds on most of these voyages. It, however, is clear that meal was carried in the lower holds [fol. 1976] on at least three previous voyages, on the "Nichiyo Maru," "Tohsei Maru," and "Soyo Maru"; that there was overheating on these voyages and that on two of these, the "Tohsei Maru" and "Nichiyo Maru," rice ventilators were used. Mr. Okubo, who was the Acting President and General Manager of the K Line, testified that he did not inform Captain Fegen or instruct anyone else to inform Captain Fegen of the experiences of the K Line, even though Mr. Okubo knew fish meal constituted a considerable portion of the cargo of the "Venice Maru," and that some part of the large shipment of meal might be stowed in a lower hold.

A ship owner has been held to be under a duty to give information to those who have to operate or repair his ship. See *The W. D. Anderson*, 17 Fed. Supp. 754, affirmed 94 Fed. (2nd) 377, certiorari denied, 303 U. S. 658; *The Vestris*, 60 Fed. (2nd) 273, 286; *The Schwan*, 1909 A. C. 450, 454; *Standard Oil Co.* v. *Clan Line Steamers, Ltd.*, 1924 A. C. 100, 110, 114, 123, 124, 126, *et seq.*, and it is conceivable that a like duty may in certain circumstances be imposed upon an owner regarding stowage. But in each of the cases above cited, the courts held it was unreasonable for the owner to expect anyone else to possess knowledge of an existing peculiarity of the particular ship of which information was withheld.

The K Line was justified in relying upon the expert knowledge of Captain Fegen, a capable and experienced surveyor, as to what was the proper method of stowing and ventilating the meal. There was not any proof that Captain Fegen did not know or was unable to find out about heating of fish meal during its transportation to United States Atlantic ports.

That there had been overheating, even when rice ventilators were resorted to, was knowledge that experts on stowage could reasonably have been expected to have had at the time. There was not any reason why the K Line [fol. 1977] should have suspected that Captain Fegen did not have this information. I find, therefore, that Mr. Okubo was not negligent in failing to inform Captain Fegen about the experiences of the K Line. It also follows that he was not required to issue special instructions as to stowage to officers of the "Venice Maru" since Captain Fegen, who was well qualified, was employed to do so.

Mr. Okubo did not know that cargo was stowed on the weatherdeck until after the "Venice Maru" had sailed from Japan, or that any part of the cargo placed on the deck had been stowed on hatch covers until after the voyage had ended. He was not an expert; he did not know the details of the stowage, or that the deck cargo would have any effect upon the ventilation of No. 1 lower hold. He accordingly was not negligent in failing to make arrangements to have the cargo shipped under deck after the "Venice Maru" reached Los Angeles or in failing to consult Captain Fegen concerning the deck cargo. Nor is it probable that any change would have been made had he consulted Captain Fegen, upon whose judgment he relied, for the latter stated he believed it was unnecessary to uncover more than one-third of the hatch.

The stowage on deck of cargo shipped under clean bills of lading constituted a deviation but such deviation does not deprive the ship owner of his right to exoneration under the Fire Statute, unless it was a cause of the fire. *The Ida*, 75 Fed. (2nd) 278, 279; *Globe & Rutgers Fire Insurance Co. v. United States*, 105 Fed. (2nd) 160, 166, and not even then, unless the deviation was the result of the neglect or design of the owner personally. See *The Ida*, *supra*. Though the stowage on the hatch may have interfered in some measure with the ventilation of the cargo under deck

and may have hindered efforts to prevent the outbreak of the fire, the claimants have failed to establish that stowage on the hatch covers was the result of the design or neglect on the part of the K Line.

[fol. 1978] The K Line therefore is entitled to exoneration of liability under the Fire Statute.

The record does not disclose any negligence on the part of Kabushiki Kaisha Kawasaki Zosenjo or of any persons for whose acts it is responsible. Not having had anything whatsoever to do with the stowage or operation or control of the ship, it also is exonerated from liability under the Fire Statute, assuming there otherwise were liability.

The K Line refuses to return to claimants general average deposits exacted by it before delivering the cargo to them, contending that the deposits were properly exacted.

An owner who is exonerated from liability by the Fire Statute does not thereby become entitled to general average contribution. His right to contribution must rest upon an agreement. *Globe & Rutgers Fire Ins. Co.* v. *United States*, 105 Fed. (2nd) 160, 164.

The bills of lading contain a Jason Clause, which provides that "if the shipowner shall have exercised due diligence to make the vessel in all respects seaworthy," in case of damage resulting from unseaworthiness, the cargo owners shall contribute with the ship owner in general average. The Harter Act, 46 U. S. C. A. 192, exempts the ship owner under certain circumstances from liability for damage which otherwise would exist "if the owner of any vessel shall exercise due diligence to make the said vessel in all respects seaworthy."

The Harter Act, Section 3, 46 U. S. C. A. 192, does not apply in case the owner or any of the owner's agents fail to use due diligence to make the vessel seaworthy. See *Earle & Stoddart* v. *Wilson Line*, 287 U. S. 420, 426. The Jason Clause refers to the due diligence of the owner in words almost identical with those used in Section 3 of the Harter Act. It accordingly may be assumed that the words were used with the same meaning and effect, and that the owner is not entitled to contribution if his agents fail to exercise due diligence.

[fol. 1979] Moreover, 46 U. S. C. A. 191 provides that it shall not be lawful for any owner to insert in any bill of lading any agreement whereby the obligation of the owner to exercise due diligence to make the vessel seaworthy or

to stow her cargo carefully shall in any wise be lessened or avoided. To allow the owner contribution in case of his agent's negligence would violate this provision, since it would lessen his liability in situations in which 46 U. S. C. A. 192 would not relieve him thereof.

The stowage of the meal on the "Venice Maru" was negligent and made the vessel unseaworthy. Since "due diligence" had not been exercised by Captain Fegen, the Jason Clause does not apply and the general average deposits must be returned with interest.

Findings of facts, conclusions of law and a decree in accordance herewith are to be submitted.

March 31st, 1941.

William Bondy, U. S. D. J.

In United States District Court, Southern District of New York

Findings of Fact and Conclusions of Law

Findings of Fact

(1) Petitioner, Kabushiki Kaisha Kawasaki Zosenjo, a Japanese corporation with its main office at Kobe, Japan, was at all times material hereto owner of the Steamship "Venice Maru." It had nothing whatsoever to do with the stowage or operation or control of the ship.

(2) Petitioner, Kawasaki Kisen Kabushiki Kaisha, hereinafter referred to as the "K" Line, a Japanese cor- [fol. 1980] poration with its main office located at Kobe, Japan, was at all times material hereto bareboat charterer of the Steamship "Venice Maru" and operated, manned, victualed and navigated her in the common carriage of goods for hire.

(3) The claimants in this limitation proceedings are either the owners of cargo carried on board the S. S. "Venice Maru" on her July, 1934, sailing from Japan or are trustees for owners of such cargo. All of the cargo involved had been shipped on board the S. S. "Venice Maru" in apparent good order and condition for carriage pursuant to the terms and conditions of certain negotiable bills of lading duly issued either by the head office of the

petitioner, Kawasaki Kisen Kabushiki Kaisha, or by one of its sub-offices or by its duly authorized agents. Said bills of lading specifically provided, inter alia, that they were subject to the terms and conditions of the Harter Act (46 U. S. Code Sec. 190-195) and also contained a clause reading as follows:

> "If the shipowner shall have exercised due diligence to make the vessel in all respects seaworthy and to have her properly manned, equipped and supplied, in case of danger, damage or disaster, resulting from accident or faults or errors in navigation, or in the management of the vessel, or from any latent or other defect in the vessel, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage, if the defect or unseaworthiness was not discoverable by the exercise of due diligence, the shippers, consignees or owners of the cargo nevertheless pay salvage and special charges incurred in respect of the cargo, and shall contribute with the shipowners in general average to the payment of any sacrifices, losses, or expenses of general average nature that may be made or incurred for the com- [fol. 1981] mon benefit, or to relieve the adventure of any common peril, all with the same force and effect and to same extent as if such accident, danger, damage or disaster had not resulted from, or been occasioned by faults or errors in navigation or in the management of the vessel, or by any latent or other defect or unseaworthiness."

None of the bills of lading covering cargo carried on this voyage of the "Venice Maru" provided for on-deck stowage.

(4) On July 5th, 1934, the "Venice Maru" with some general cargo aboard arrived at Kobe where the main offices of the petitioners were located.

(5) At Kobe more general cargo and 1,900 tons of sardine meal in 38,000 bags were taken aboard to be carried to Atlantic Coast ports in the United States via the Panama Canal. Of the 38,000 bags, 13,312 were stowed in No. 1 lower hold, 11,848 in No. 3 lower hold, 6,735 in No. 6 lower hold and 6,069 in No. 3 tweendeck.

(6) 1,087 cases of porcelain goods were thereafter loaded on the ship's weatherdeck at Nagoya.

(7) About 595 additional cases of porcelain goods were transferred from the ship's hold to the weatherdeck at Yokohama.

(8) The "Venice Maru" sailed from Yokohama July 13th, with all holds full and with 1,682 cases of porcelain goods on the weatherdeck covering most of the free deck space and the after two-thirds of No. 1 weatherdeck hatch.

(9) After encountering heavy rains which prevented as much ventilation as was anticipated to under deck cargo, [fol. 1982] the "Venice Maru" arrived at Los Angeles July 29th, where 91 tons of cargo were discharged.

(10) The "Venice Maru" left Los Angeles July 30th for Balboa with her weatherdeck and the after two-thirds of No. 1 weatherdeck hatch still covered by the aforesaid porcelain goods cargo. She encountered fine but hot weather after leaving Los Angeles.

(11) Early in the morning of August 6th, while the "Venice Maru" was between Los Angeles and Balboa, smoke was observed coming out of the ventilators leading into No. 1 lower hold. Some of the bags of sardine meal stowed therein were found to be heating and giving off smoke. Notwithstanding efforts to control the situation fire broke out, resulting in damage to and destruction of cargo by fire and water used to extinguish it.

(12) In addition to many shipments which became a total loss by reason of the fire on board the "Venice Maru" and the means taken to extinguish it, many other shipments sustained partial damage by the same causes.

(13) On delivery at destination of such cargo as had not been so severely damaged as to necessitate its disposal at Panama, the "K" Line as trustee exacted general average guarantees and, in some instances cash general average deposits as a condition precedent to the delivery of such cargo. Subsequently, a general average adjustment was issued by Messrs. Johnson & Higgins, general average adjustors appointed by the "K" Line as trustee.

(14) The sardine meal shipped in the "Venice Maru" had been manufactured in Japan in the usual manner and

it was merchantable and fit for transportation by sea from Kobe to New York if properly stowed and ventilated.

[fol. 1983] (15) All analyses of the sardine meal shipped on the vessel, excepting only the analysis made by one of the shipper's competitors, disclose that the moisture content of samples of the meal varied between 7.87% and 9.28%, and the oil content between 6.84% and 8.54%, well within the range of high grade Japanese sardine meal.

(16) The sardine meal was packed, as was usually done, in second-hand bags. Even assuming there was grain dust on some of the bags, the risk of spontaneous combustion was not thereby increased.

(17) No. 1 lower hold, in which 13312 bags of sardine meal were stowed, was a large cargo compartment, about 60 feet long, about 46 feet wide and from 20 to 23½ feet deep, with a tweendeck compartment 9½ feet deep and a shelterdeck compartment 8 feet deep above it.

(18) The sardine meal was stowed in a substantially solid mass and occupied substantially the entire No. 1 lower hold, except a foot or two along the bulkheads and sides, and between the top of the cargo and overhead deck beams and a channel about one foot wide running athwartships through the middle of the stow. Five rows of rice ventilators extended fore and aft in the 5th, 10th and 16th tiers of bags and six rows of such ventilators extended athwartships in the 6th, 11th and 17th tiers of the stow. These were connected with vertical rice ventilators placed at the four corners of the hatchway.

(19) The permanent ventilating system of the "Venice Maru" was sufficient for the carriage of general cargo.

(20) Sardine meal has been recognized as an hazardous cargo, subject to heating and to spontaneous combustion. Properly stowed in small lots adequately ventilated it had been frequently carried safely by sea from Japan to the [fol. 1984] United States in tweendecks and in holds, notwithstanding its well known propensity to spontaneous combustion. Only a small quantity of the meal so shipped to the United States was better in quality than that shipped on the "Venice Maru."

(21) The variations that must have existed in the moisture and fat contents of the sardine meal in the bags did not interfere with its safe transportation.

(22) The "K" Line, before the shipment in question, had experience in the carriage of Japanese sardine meal from Japan to the Pacific Coast of the United States and to a lesser extent to the Atlantic Coast ports of the United States. It, however, experienced trouble from overheating of sardine meal on five of its vessels commencing with the voyage of the "Montreal Maru" sailing from Yokohama, September, 1933. In each case the overheating occurred after the vessels had left Los Angeles on their way to the Atlantic Coast, notwithstanding that rice ventilators had been used on two of these ships, the "Nichiyo Maru" and the "Tohsei Maru," both of which arrived in New York in May 1934, before the "Venice Maru" had sailed from Japan.

(23) The effect of the use of rice ventilators placed throughout the stow was unknown, uncertain and speculative.

(24) Some of the sardine meal which was discharged at Balboa for ventilation was restowed on the "Venice Maru" and divided into small lots with channels between them in accordance with the block and channel method which came into general use in 1935, when it was realized that the experiments with rice ventilators proved unsatisfactory.

(25) The evidence does not establish any custom or usage in the carriage of fish meal from Japan to Atlantic [fol. 1985] Coast ports which justified the stowing of 665.6 tons of fish meal, with or without rice ventilators, in a substantially solid mass so as almost to fill a lower hold.

(26) The nature of sardine meal necessitates exposing a sufficiently large part thereof to circulating air.

(27) The stowage of 665.6 tons of sardine meal in a substantially solid mass in No. 1 lower hold for the long voyage from Kobe to Atlantic Coast ports via the Panama Canal, constituted negligence.

(28) The stowage of the 665.6 tons of sardine meal in No. 1 lower hold, as described in findings (18) and (27), was a proximate cause of the fire in that, even assuming that

rice ventilators were used in the manner claimed by the "K" Line, insufficient ventilation was provided.

(29) The "K" Line had no marine superintendent connected with its head office at Kobe. Captain Fegen was the sole person from shore at Kobe charged with the duty by "K" Line of seeing to safe stowage of sardine meal on the "Venice Maru."

(30) Captain Fegen laid out and personally supervised the stowage on the "Venice Maru" of the 38,000 bags or 1,900 short tons of sardine meal which the head office of "K" Line had booked for carriage on that vessel.

(31) There was not any negligence in the delegation by "K" Line of the duty to plan and supervise the stowage of the sardine meal to Captain Fegen, an experienced Lloyd's Agent marine surveyor, well qualified to perform the service.

(32) Captain Fegen's authority was limited to supervision of sardine meal stowage for the "K" Line at Kobe [fol. 1986] and to the giving of instructions to the masters with reference to such stowage.

(33) Captain Fegen was not a marine superintendent, general agent or managing officer of the "K" Line. He was simply an independent surveyor without power to control the movement, or crew of the ship, or to bind the "K" Line by contract.

(34) Prior to the loading of the "Venice Maru" the "K" Line had carried large quantities of sardine meal on many occasions but the record does not disclose what, if any, part was stowed in the lower holds on most of these voyages. It, however, is clear that sardine meal was carried in the lower holds on at least three previous voyages, on the "Nichiyo Maru," "Tohsei Maru," and "Soyo Maru"; that there was overheating on these voyages and that, on two of these, the "Tohsei Maru" and "Nichiyo Maru," rice ventilators were used.

(35) Mr. Okubo was the Acting President and General Manager of the "K" Line and its only officer actively participating in its business affairs and the operations of its vessels.

(36) Mr. Okubo knew that "K" Line had contracted to carry general cargo on the "Venice Maru" on the voyage in question in addition to the sardine meal.

(37) Mr. Okubo did not inform Captain Fegen or instruct any one else to inform Captain Fegen of the experiences of the "K" Line, even though Mr. Okubo knew sardine meal constituted a considerable portion of the cargo of the "Venice Maru," and that some part of the large shipment of such meal might be stowed in a lower hold.

[fol. 1987] (38) The "K" Line was justified in relying upon the expert knowledge of Captain Fegen, a capable and experienced surveyor, as to what was the proper method of stowing and ventilating the sardine meal.

(39) There was not any proof that Captain Fegen did not know or was unable to find out about heating of sardine meal during its transportation to United States Atlantic ports.

(40) The fact that there had been overheating of sardine meal, even when rice ventilators were resorted to, was knowledge that experts on stowage could reasonably have been expected to have had at the time. There was not any reason why the "K" Line should have suspected that Captain Fegen did not have this information.

(41) Mr. Okubo was not negligent in failing to inform Captain Fegen about the experiences of the "K" Line.

(42) Mr. Okubo was not required to issue special instructions as to stowage to officers of the "Venice Maru" since Captain Fegen, who was well qualified, was employed to do so.

(43) Mr. Okubo did not know that cargo was stowed on the weatherdeck until after the "Venice Maru" had sailed from Japan, or that any part of the cargo placed on the deck had been stowed on hatch covers until after the voyage had ended.

(44) Mr. Okubo was not an expert; he did not know the details of the stowage, or that the deck cargo would have any effect upon the ventilation of No. 1 lower hold and accordingly was not negligent in failing to make arrangements to have such cargo shipped under deck after the

"Venice Maru" reached Los Angeles or in failing to consult Captain Fegen concerning the deck cargo.

[fol. 1988] (45) It is not probable that any change would have been made after the vessel reached Los Angeles had Mr. Okubo consulted Captain Fegen, upon whose judgment he relied for the latter stated he believed it was unnecessary to uncover more than one-third of the hatch.

(46) Though the stowage on the hatch may have interfered in some measure with the ventilation of the cargo under deck and may have hindered efforts to prevent the outbreak of the fire, claimants have failed to establish that such stowage was the result of the design or neglect of the "K" Line.

(47) The record does not disclose any negligence on the part of Kabushiki Kaisha Kawasaki Zosenjo or of any persons for whose acts it is responsible.

(48) The "K" Line refuses to return to cargo claimants general average deposits exacted by it from certain of them before delivering the cargo to them, contending that the deposits were properly exacted.

(49) The stowage of the sardine meal on the "Venice Maru" was negligent and made the vessel unseaworthy.

(50) "Due diligence" to make the vessel seaworthy was not exercised by Captain Fegen in stowing the sardine meal in No. 1 lower hold of the "Venice Maru."

(51) The fire on board the "Venice Maru" created an imminent physical peril common to vessel and cargo. The voluntary sacrifices made in the efforts to extinguish the fire by the use of water and steam successfully averted this common peril. The "K" Line also subsequently incurred various expenses and made certain disbursements of a general average nature.

[fol. 1989] CONCLUSIONS OF LAW

(1) The stowage of 665.6 tons of sardine meal in a substantially solid mass in No. 1 lower hold of the "Venice Maru" for the long voyage from Kobe to U. S. Atlantic Coast ports via the Panama Canal constituted negligence and such negligence was a proximate cause of the fire.

(2) The duty to stow cargo properly is considered delegable in determining whether there was design or neglect of the shipowner personally within the provisions of the Fire Statute. There was not any negligence in the delegation of the duty to plan and supervise the stowage of the sardine meal to Captain Fegen, an experienced Lloyd's Agent's Marine Surveyor.

(3) The negligent stowage of the sardine meal in No. 1 lower hold by Captain Fegen was not neglect of the owner personally and does not deprive the "K" Line of its right to exoneration under the Fire Statute.

(4) Mr. Okubo, Acting President and General Manager of the "K" Line, was not negligent in failing to inform or to instruct any one else to inform Captain Fegen of the experiences of the "K" Line with overheating of sardine meal previously carried on at least three voyages of other "K" Line vessels although Mr. Okubo knew that sardine meal constituted a considerable portion of the cargo of the "Venice Maru" and that some part of the large shipment of meal might be stowed in a lower hold.

(5) Mr. Okubo, the Acting President and General Manager of the "K" Line, was not negligent in failing to make arrangements, upon learning after the "Venice Maru" sailed from Japan of the stowage of cargo on the weatherdeck of the vessel, to have such cargo shipped under deck after the vessel reached Los Angeles.

[fol. 1990] (6) Mr. Okubo, the Acting President and General Manager of the "K" Line, was not negligent, upon learning after the "Venice Maru" sailed from Japan of the stowage or cargo on the weatherdeck of the vessel, in failing to consult Captain Fegen concerning such deck cargo.

(7) Mr. Okubo, the Acting President and General Manager of the "K" Line, was not negligent in failing to issue special instructions as to stowage and care of the sardine meal to the officers of the "Venice Maru."

(8) The stowage on deck of cargo shipped under clean bills of lading constituted a deviation, but does not deprive the "K" Line of its right to exoneration under the Fire Statute unless it was a cause of the fire and not even then unless the deviation was the result of the neglect or design

of "K" Line personally, which the claimants have failed to show.

(9) Though the stowage of deck cargo on the weather-deck hatch may have interfered in some measure with the ventilation of the cargo under deck and may have hindered efforts to prevent the outbreak of the fire, the claimants have failed to establish that the stowage on the hatch covers was the result of design or neglect of the "K" Line.

(10) The "K" Line is entitled to exoneration of all liability under the Fire Statute except contribution in general average.

(11) The record does not disclose any negligence on the part of Kabushiki Kaisha Kawasaki Zosenjo or of any persons for whose acts it is responsible. It is entitled to exoneration of all liability under the Fire Statute, assuming there otherwise were liability.

(12) A ship owner who is exonerated from liability by the Fire Statute does not thereby become entitled to general average contribution. His right to such contribution must rest upon an agreement.

[fols. 1991-1998] (13) The Jason Clause in the bills of lading, which provides that, "if the shipowner shall have exercised due diligence to make the vessel in all respects seaworthy," the cargo owners shall contribute with the shipowner in general average in case of disasters caused by unseaworthiness, refers to due diligence of the owner in words almost identical with those used in Section 3 of the Harter Act and accordingly such words are to be similarly construed as meaning that the owner is not entitled to such contribution if his agents fail to exercise due diligence.

(14) Due diligence to make the vessel seaworthy had not been exercised by Captain Fegen in stowing the sardine meal in No. 1 lower hold and the vessel was unseaworthy by reason of such stowage. The Jason Clause does not apply and the general average deposits exacted by "K" Line from cargo claimants must be returned with interest.

(15) The prayer for exoneration of the petitioner, Kabushiki Kaisha Kawasaki Zosenjo, should be granted with costs, and all claims should be dismissed as against it.

(16) The prayer for exoneration of the petitioner, Kawasaki Kisen Kabushiki Kaisha, should be granted, and all claims except contribution in general average should be dismissed as against it excepting further (1) so much of the claim of Fritz Reiber as represents a general average deposit made by said claimant in the sum of $575, with interest on the sum of $1,935 from September 15, 1934 to January 9, 1935 and interest on $575 from January 9, 1935, and (2) so much of the claim of York Feather and Down Corporation as represents a general average deposit made by said claimant in the sum of $509.05 with interest from September 14, 1934.

Dated, New York, N. Y., July 29, 1941.

William Bondy, District Judge.

. . . . . .

[fol. 1999] In United States District Court

Final Decree—July 29, 1941

Present: Hon. William Bondy, D. J.

A petition having been filed herein on or about November 16, 1934, by Kabushiki Kaisha Kawasaki Zosenjo, as Owner, and Kawasaki Kisen Kabushiki Kaisha, as Bareboat Charterer of the S.S. "Venice Maru" praying for exoneration from or limitation of liability for any loss, damage, destruction, injury or any claim whatsoever in any way arising out of or in consequence of a fire on board the S.S. "Venice Maru," extending from on or about August 6th to on or about August 11th, 1934, while the vessel was on a voyage with cargo from Japanese ports to U. S. Atlantic Coast ports as more fully described in said petition and for certain other relief;

And security in the form of an *ad interim* stipulation for value having been filed herein on November 16, 1934, by the said petitioners and the Court having approved the filing thereof by its order dated November 17, 1934;

And the Court by its said order of November 17, 1934, having directed a monition to issue in the usual form and having thereafter and on or about November 20, 1934,

issued its monition, pursuant to said order against all persons claiming damages by reason of the matters aforesaid, citing and requiring all such persons to appear before the Court and make due proof of their respective claims and to answer the petition on or before the 31st day of [fol. 2000] December, 1934, at 10:30 A. M. and appointing Godfrey Updike, Esq., 150 Broadway, New York, N. Y., as the Commissioner before whom proof of claims presented pursuant to said monition should be made; and the Court having issued the usual restraining order;

And public notice of said monition having been duly given as required by law, by the practice of this Court and by said order; and copies of said monition having been duly served and mailed in accordance with the terms of said order, all of which appears from affidavits heretofore filed herein; and, upon the return of said monition, proclamation having been duly made; and time for presentation of such claims having been duly extended to January 9, 1935 by order of this Court dated December 27, 1934; and the Commissioner on January 18, 1935 having duly filed his report dated January 15, 1935 enumerating therein 129 claims which had been presented and filed pursuant to said monition, and the Court by its order dated January 21, 1935, having noted the defaults of all persons whose claims had not theretofore been presented and having ordered that all issues raised by the petition and answers thereto stand for trial before the Court according to the rules and practice thereof;

And the Court thereafter on motion having opened the aforesaid default and extended the time for filing claims of certain designated persons only to April 17, 1935, by order of the Court dated April 5, 1935, and again on motion having opened the aforesaid default and extended the time for filing claims of certain other designated persons only to August 12, 1935 by order of the Court dated July 24, 1935, and again on motion having opened the aforesaid default and extended the time for filing claims of certain other designated persons only to April 15, 1938 by order of the Court dated March 25, 1938; and the Commissioner having filed on May 29, 1935 a supplemental report dated May 29, 1935 enumerating three additional [fol. 2001] claims which had been presented and filed pursuant to the aforesaid order of the Court dated April 5, 1935,

and on October 15, 1935, having filed his further supplemental report dated October 14, 1935 enumerating 42 additional claims which had been presented and filed pursuant to the aforesaid order of the Court dated July 24, 1935, and on May 12, 1938 having filed his final supplemental report dated May 11, 1938, enumerating 45 additional claims which had been presented and filed pursuant to the aforesaid order of the Court dated March 25, 1938;

And objections having been duly filed by the petitioners to all of the aforesaid claims; and answers to the petition having been filed herein by certain claimants on their own behalf and on behalf of all other claimants similarly situated contesting petitioners right to exoneration from or limitation of liability, and Counsel for all other claimants and for petitioners having agreed that said answers should stand for all other claimants; and the time of all claimants to present claims and to answer the petition having expired;

And this cause having duly come on for trial and final hearing before this Court on the pleadings and proofs of the respective parties and having been argued and submitted by their advocates;

And the Court, after due deliberation, having filed its opinion in writing, dated March 31, 1941, by which opinion it was among other things held that the fire and the loss, destruction, damage and injury arising therefrom were not caused by the design or neglect of the petitioners or either of them and that Kabushiki Kaisha Kawasaki Zosenjo was entitled to exoneration from liability therefor; and that Kawasaki Kisen Kabushiki Kaisha was entitled to exoneration from liability therefor except contribution in general average.

And the Court having made and filed its findings of fact and conclusions of law;

[fol. 2002] And the costs of the petitioner, Kabushiki Kaisha Kawasaki Zosenjo having been duly taxed in the sum of $14,237.41;

Now, upon motion of Crawford & Sprague, Proctors for petitioners, it is, by the Court

Ordered, adjudged and decreed that the defaults of all persons and corporations, who may have sustained any loss, destruction, damage or injury caused by, arising out of or resulting from the fire described in the petition and who have not heretofore filed claims herein, be and they

are hereby noted and entered and that the defaults of all such persons and corporations, who have failed to file answers herein, be and they hereby are noted and entered, and that the filing and presentation hereafter of any such claims or answers except for contribution in general average be and are forever barred and restrained, and it is further

Ordered, adjudged and decreed that the fire described in the petition was not caused by the design or neglect of the petitioners, Kabushiki Kaisha Kawasaki Zosenjo and Kawasaki Kisen Kabushiki Kaisha, or either of them, and did not occur with the privity or knowledge of said petitioners or either of them; and it is further

Ordered, adjudged and decreed that the petitioner, Kabushiki Kaisha Kawasaki Zosenjo, be and it hereby is forever exonerated and discharged from liability for any loss, damage, destruction, injury, or any other claim whatsoever in any way caused by, arising out of or resulting from the said fire; and it is further

Ordered, adjudged and decreed that the petitioner, Kawasaki Kisen Kabushiki Kaisha, be and it hereby is forever exonerated and discharged from liability for any loss, [fol. 2003] damage, destruction, injury or any other claim whatsoever in any way caused by, arising out of or resulting from the said fire, excepting only contribution in general average; and it is further

Ordered, adjudged and decreed that the petitioner, Kawasaki Kisen Kabushiki Kaisha, is not entitled to retain general average deposits exacted by it from claimant, Fritz Reiber, and claimant, York Feather & Down Corporation, before delivery of cargo, but must return the same with interest to said claimants respectively; and it is further

Ordered, adjudged and decreed that all persons or corporations, having or claiming to have sustained any loss, damage, destruction or injury by reason of or in connection with the fire referred to in the petition, be and they hereby are perpetually enjoined and restrained from instituting or prosecuting in any manner whatsoever in this or in any other proceeding, suit or action in any court or in any country any claim, action, suit or proceeding whatsoever against the petitioner, Kabushiki Kaisha Kawasaki Zosenjo or its successor; and it is further

Ordered, adjudged and decreed that all persons or corporations, having or claiming to have sustained any loss, damage, destruction or injury by reason of or in connection with the fire referred to in the petition, be and they hereby are perpetually enjoined and restrained from instituting or prosecuting in any manner whatsoever in this or in any other proceeding, suit or action in any court or in any country any claim, action, suit or proceeding whatsoever, excepting only contribution in General Average, against the petitioner, Kawasaki Kisen Kabushiki Kaisha or its successor or against the S. S. "Venice Maru" her engines, etc. and her freight and passage moneys, or against any other vessel or property of the said petitioner or of its successor; and it is further

[fol. 2004] Ordered, adjudged and decreed that all claims heretofore filed herein be and they hereby are dismissed on the merits as against the petitioners, Kabushiki Kaisha Kawasaki Zosenjo; and it is further

Ordered, adjudged and decreed that all claims other than for contribution in general average heretofore filed herein be and they hereby are dismissed on the merits as against the petitioner, Kawasaki Kisen Kabushiki Kaisha, excepting only (1) so much of the claim of Fritz Reiber as represents the general average deposit paid by him, (2) so much of the claim of York Feather & Down Corporation as represents the general average deposit paid by it; and it is further

Ordered, adjudged and decreed that the claimant Fritz Reiber, have and recover from the petitioner, Kawasaki Kisen Kabushiki Kaisha, and of or from its ad interim stipulator for value, the sum of $575, as and for the general average deposit paid by him with interest on $1360 from September 15, 1934 to January 9, 1935, amounting to $25.99, and interest on $575 from September 15, 1934, to date hereof, amounting to $235.24 being a total of $836.23, and that said claimant have judgment and execution therefor as provided by law and by the rules of this Court; and it is further

Ordered, adjudged and decreed that the claimant, York Feather & Down Company, have and recover from the petitioner, Kawasaki Kisen Kabushiki Kaisha, and of or from its ad interim stipulator for value, the sum of $509.05 as and for the general average deposit paid by it with interest thereon from September 14, 1934, amounting to $208.35

being a total of $717.40, and that said claimant have judgment and execution therefor as provided by law and by the rules of this Court; and it is further

Ordered, adjudged and decreed that said petitioner Kabushiki Kaisha Kawasaki Zosenjo have and recover [fol. 2005] from the claimants, and of and from their stipulators for costs (to the extent of their stipulations), the sum of $14,237.41, petitioner's costs incurred in establishing its exoneration from or limitation of liability in this proceeding, as taxed, and that said petitioner have judgment and execution therefor as provided by law and by the rules of this Court; and it is further

Ordered, adjudged and decreed that such cargo claimants who have heretofore duly filed claims in this proceeding and who have valid claims in general average for sacrifices made for the safety of the common adventure, do have and recover of and from the Kawasaki Kisen Kabushiki Kaisha and its stipulators for value, the net amounts due such claimants in general average and that such claims be referred to William N. Davey, Esq., as Commissioner, to ascertain and compute the net amounts respectively due such claimants in general average and to report thereon to this Court with all convenient speed; and it is also hereby further

Ordered, adjudged and decreed, that the prayer of the petitioner, Kawasaki Kisen Kabushiki Kaisha, for limitation of its liability to the value of the S.S. "Venice Maru" and her pending freight be and the same hereby is granted and that the liability of said petitioner for all claims in general average against it arising out of this voyage of the S.S. "Venice Maru" shall not exceed the value of the S.S. "Venice Maru" and her pending freight and that the Commissioner above named shall take proof thereon and report to this Court with all convenient speed; and it is also hereby further

Ordered that the question of the allocation of the costs of this proceeding as between the petitioner, Kawasaki Kisen Kabushiki Kaisha, and the various classes of claimants herein be deferred until the entry of final decree herein.

William Bondy, United States District Judge.

[fol. 2006] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

NOTICE OF APPEAL AND ORDER OF ALLOWANCE

SIRS:

Please take notice that cargo claimants, Consumers Import Co., Inc.,* and their stipulators for costs hereby appeal to the United States Circuit Court of Appeals for the Second Circuit from the decree of the District Court, entered herein on August 1, 1941, in so far as:

* * * * * * *

[fol. 2007] 6. It decrees that all persons or corporations having or claiming to have, sustained any loss, damage, destruction or injury by reason of, or in connection with, the fire referred to in the petition, are perpetually enjoined and restrained from the instituting or prosecuting in any manner whatsoever in this or in any other proceeding, suit, or action in any court or in any country, any claim, action, suit or proceeding whatsoever, excepting only contribution in general average, against petitioner, Kawasaki Kisen Kabushiki Kaisha, or its successor, or against the steamship "Venice Maru," her engines, etc., and her freight and passage moneys, or against any other vessel or property of the said petitioner or of its successor.

7. It decrees that petitioner, Kabushiki Kaisha Kawasaki Zosenjo, is forever exonerated and discharged from liability for any loss, damage, destruction, injury, or any other claim whatsoever in any way caused by, arising out of, or resulting from the said fire.

8. It decrees that all claims heretofore filed herein are dismissed on the merits as against petitioner, Kabushiki Kaisha Kawasaki Zosenjo.

9. It decrees that all persons or corporations having or claiming to have sustained any loss, damage, destruc-

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* The names of the other 203 cargo-claimants set forth in the original are not printed by agreement between counsel.

tion, or injury by reason of or in connection with the fire referred to in the petition are perpetually enjoined and restrained from instituting or prosecuting in any manner whatsoever in this or in any other proceeding, suit or action in any court, or in any country, any claim, action, [fol. 2008] suit or proceeding whatsoever against petitioner, Kabushiki Kaisha Kawasaki Zosenjo, or its successor.

10. It decrees that petitioner, Kabushiki Kaisha Kawasaki Zosenjo, have and recover from the claimants, and of and from their stipulators for costs (to the extent of their stipulations), the sum of $14,237.41, said petitioner's costs as taxed, and that said petitioner have judgment and execution therefor.

Dated, New York, N. Y., August 8th, 1941.

Yours, etc., Bigham, Englar, Jones & Houston, Proctors for Cargo Claimant, Consumers Import Co., Inc., and 182 Other Cargo Claimants, 99 John Street, New York City. Hill, Rivkins & Middleton, Proctors for Cargo Claimant, Winckler & Company, and 15 Other Cargo Claimants, 60 Wall Street, New York City. Hatch & Wolfe, Proctors for Cargo Claimant, Haruta & Co., Inc., and 4 Other Cargo Claimants, 70 Pine Street, New York City.

To Messrs. Crawford & Sprague, Proctors for Petitioners, 117 Liberty Street, New York City.

The foregoing appeal is hereby allowed this 11th day of August, 1941.

Edward A. Conger, U. S. D. J.

[fols. 2009-2018] In United States District Court, Southern District of New York

Assignment of Errors

Cargo claimants, Consumers Import Co., Inc.;* hereby assign error in the opinion of the District Court herein dated March 31, 1941, in the Findings of Fact and Conclu-

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* The names of the other 203 cargo claimants set forth in the original are not printed by agreement between counsel.

sions of Law filed herein and in the Decree of the District Court entered herein on August 1, 1941, as follows:

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50.

[fol. 2019] In that the District Court erred in holding that the vessel owner, Kabushiki Kaisha Kawasaki Zosenjo, is entitled to exoneration of all liability with respect to particular average damage under the Fire Statute.

51. In that the District Court erred in holding that all claims heretofore filed herein should be dismissed on the merits as against petitioner, Kabushiki Kaisha Kawasaki Zosenjo, the owner of the steamship "Venice Maru."

• • • • • • • •

53. In that the District Court erred in holding that all persons or corporations having or claiming to have sustained loss, damage, destruction or injury by reason of, or in connection with, the fire referred to in the petition should be perpetually enjoined and restrained from instituting or prosecuting in any manner whatsoever in this or in any other proceeding, suit, or action in any court or in any country, any claim, action, suit or proceeding whatsoever, excepting only contribution in general average, against petitioner, Kawasaki Kisen Kabushiki Kaisha, or its successor, or against the steamship "Venice Maru," her engines, etc., and her freight and passage moneys, or against any other vessel or property of said petitioner or its successor.

• • • • • • • •

[fol. 2020] 55. In that the District Court erred in holding that all persons or corporations having or claiming to have sustained any loss, damage, destruction or injury by reason of, or in connection with, the fire referred to in the petition, should be perpetually enjoined and restrained from instituting or prosecuting in any manner whatsoever in this or in any other proceeding, suit or action in any court or in any country, any claim, action, suit or proceeding against petitioner, Kabushiki Kaisha Kawasaki Zosenjo, or its successor.

56. In that the District Court erred in failing to hold that petitioner, Kabushiki Kaisha Kawasaki Zosenjo, the

owner of the steamship "Venice Maru," was, to the extent of the value of said vessel, her engines, etc., liable for claims for contribution in general average arising from the fire referred to in the petition herein and the sacrifices of cargo made in connection therewith.

. . . . . .

[fol. 2021-2039] 61. In that the District Court erred in failing to hold that the cargo claimants were entitled to recover from the petitioners for all particular average damage sustained by their cargo during the voyage in question.

62. In that the District Court erred in holding that petitioner, Kabushiki Kaisha Kawasaki Zosenjo, should have and recover costs from the claimants and of and from their stipulators for costs.

. . . . . .

Dated, New York, N. Y., August 8th, 1941.

Bigham, Englar, Jones & Houston, Proctors for Cargo Claimant, Consumers Import Co., Inc., and 182 Other Cargo Claimants, 99 John Street, New York City.

Hill, Rivkins & Middleton, Proctors for Cargo Claimant, Winckler & Company, and 15 Other Cargo Claimants, 60 Wall Street, New York City.

Hatch & Wolfe, Proctors for Cargo Claimant, Haruta & Co., Inc., and 4 Other Cargo Claimants, 70 Pine Street, New York City.

[fol. 2040] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1942

No. 120

(Argued December 11, 1942. Decided January 25, 1943)

CONSUMERS IMPORT CO., INC., et al., Appellants,

v.

KAWASAKI KISEN KABUSHIKI KAISHA, et al., Appellees

Appeal by the claimants from a decree in the admiralty of the District Court for the Southern District of New York in a proceeding under the Fire Statute to exonerate from liability both the owner and the bareboat charterer of a vessel.

Before L. Hand, Swan and Chase, Circuit Judges

T. Catesby Jones, for the appellants.
George C. Sprague, for the appellees.

[fol. 2041] L. HAND, Circuit Judge:

This appeal comes before us from a decree in the admiralty exonerating the owner and the bareboat charterer of the S.S. "Venice Maru" from liability for damage to her cargo by a fire which occurred on board that vessel between Los Angeles and Balboa in August 1934. The appeal also involves the repayment by the bareboat charterer of certain cash payments made to it by cargo owners as contributions in general average. The decree directed the charterer to refund these and the charterer and the owner have filed cross assignments of error. We shall first consider the appeal of the cargo claimants.

The "Venice Maru," having previously stopped at several Japanese ports to take on cargo and being already partly filled, on July 5, 1934, touched at Kobe where she lifted a consignment of some 1900 tons of sardine meal in 38,000 bags, destined for Atlantic ports in the United States, via the Panama Canal. In No. 1 lower hold she stowed 13,312 bags; in No. 3 lower hold 11,848; in No. 6 lower hold, 6,735; and in No. 3 'tweendeck, 6,069. After Kobe she touched at Nagoya where she lifted 1,087 cases of porcelain goods which were stowed upon the weatherdeck, and later at Yoko-

hama 595 more cases of porcelain were added, also as deck-load. Thus, when she finally broke ground at that, her last Japanese port, on July 13th she had all holds full and a deck cargo covering most of her free deck space, among the rest the after two-thirds of No. 1 weatherdeck hatch. During the voyage to Los Angeles where she arrived on July 29th, she met with heavy rains that prevented her from ventilating the cargo as well as she had expected, but she suffered no misadventure. She discharged a few tons at that place, and left on July 30 for Balboa. The weather en route was good but hot, and early in the morning of August 6 smoke began to come out of the ventilator of No. 1 lower hold. Examination showed that some of the bags of sardine meal there [fol. 2042] stowed had heated and were smoking, and fire finally broke out. Although only some 700 bags of meal were burnt or charred, much damage was done to the other bags and to other cargo by the water used to put out the fire. At Balboa or at Panama she discharged that part of her cargo which had been consigned to different Central, and South American ports, and restowed the sardine meal that was in lower holds 3 and 6. In restowing she divided this meal into small blocks with channels running between them; this was known as the "block and channel" method; it did not come into general use for sardine meal until 1935. At New York the charterer demanded general average guarantees, and in some cases cash, as a condition upon delivery of cargo, and later a general average adjustment was made. The cash payments are those involved in the cross-appeals. The sardine meal laden at Kobe was well within the range of high grade Japanese sardine meal; the bags were proper, and the cargo was fit for carriage by sea from Kobe to New York when properly stowed and ventilated. No. 1 lower hold was from 20 to 23½ feet deep; above it was the lower 'tweendecks 9½ feet deep, and above that a second 'tweendecks, or shelter deck compartment, 8 feet deep. Six hundred and sixty-five tons of the meal—a little more than one-third of the whole consignment—were stowed in No. 1 hold, and occupied the entire hold except for a space of about a foot or eighteen inches along the bulkheads and along the sides of the ship, and for about the same space between the top of the stow and the overhead deck beams. A channel one foot wide ran athwartship through the middle, except for which the stow was a solid block. Five rows of "rice venti-

lators" ran fore and aft in the 5th, 10th and 16th tiers, and six rows athwartship in the 6th, 11th and 17th tiers; vertical ventilators connected these horizontal ventilators at the four corners of the hatch. Besides these there was a permanent ventilating system such as was usual in ships of her class.

[fol. 2043] Sardine meal, like other fish meal, when stowed on long voyages, is likely to heat and to take fire spontaneously; its susceptibility depends upon the percentage of moisture and oil which it contains. It had been a common cargo from Japan to Pacific coast ports in small parcels for five or more years before this voyage of the "Venice Maru," and no damage had ever occurred; the charterer had itself successfully carried it on over eighty voyages before September 1, 1933, and in one of these, that of the S.S. "Florida" on December 23, 1930, the cargo was nearly as great as on the "Venice Maru." The charterer's first shipment to Atlantic ports was on February 3, 1933, followed by eight other steamers—the largest consignment in which was 1100 tons: all came through undamaged. On September 1, 1933, however, the cargo of the "Montreal Maru," which had left Yokohama with 2300 tons, was found to have been in part heated at its outturn in New York on October 6. Three steamers followed to New York without incident, but on December 6th, the "Soyo Maru," which had left Yokohama on October 28, arrived in New York with about 1000 tons, also heated. Ten ships then followed to New York all without damage. On April 5, 1934, the "Soyo Maru" again left Yokohama with 1100 tons; the "Tohsei Maru" on the 25th with 560 tons; the "Nichiyo Maru" on the 28th with 1117; and the cargoes of all three heated. In the case of the last two this happened in spite of the use of "rice ventilators." The charterer attributed this to the quality of the meal itself, which had been manufactured at a small factory near Nagoya; and for that reason it refused to take any further meal from that shipper. Two cargoes were then despatched and arrived in good condition; but not so, the cargoes of the "Montreal Maru" leaving Yokohama on June 14th and arriving in New York on July 20th, or of the "Getsuyo Maru," leaving Yokohama on June 28th, and arriving in New York on July 29th. Although neither of these last two [fol. 2044] vessels contained any Nagoya meal and both carried "rice ventilators," the cargo of each heated.

After the charterer learned of the damage done on the three ships leaving in April, the latest of which, the "Tohsei Maru" arrived on June 1st, it not only gave directions to take no more of the Nagoya meal, but it retained one, Fegen, to take charge of the stowage of any future shipments, and the first ship which he stowed was the "Getsuyo Maru." He had been a marine surveyor for 23 years, all the time in Kobe acting as Lloyds' agent; he had surveyed all sorts of cargoes including sardine meal; before becoming a surveyor he had had twenty years sea experience from seaman to captain; and he held a master's license both on British and Japanese ships. Although as a master he had never carried sardine or other fish meal, he had frequently carried another perishable cargo, rice, and was familiar with the use of "rice ventilators." It was he who had stowed No. 1 lower hold of the "Venice Maru" in the way we have described. The charterer's business was in charge of one, Okubo, who lived in Kobe, and who alone had the active direction of its affairs, although it had a president, who was inactive. Okubo knew of the previous heating of all the cargoes mentioned except those leaving in June; he did not tell Fegen of these when he retained him, and he paid no further attention to the stowage.

A preliminary question arises as to the liability of the ship *in rem*, assuming that the owner is not liable *in personam*. The claimants argue that the statute does not destroy any liens upon the ship, for it is to be read *in pari materia* with §183 of Title 46, U. S. Code. Such indeed appears to have been the opinion of the Fifth Circuit in *The Etna Maru*, 33 Fed. (2d) 232, which also held that unseaworthiness of the ship barred exoneration under the Fire Statute. So far as that decision retains any authority after *Earle & Stoddard* v. *Wilson Line*, 287 U. S. 420, we cannot [fol. 2045] agree: §182 gives complete exoneration of liability; §183 only a limitation of liability. To say that an owner is completely exonerated, although one may arrest his ship and sell it, is a contradiction in terms, unless we are to think of the ship as a jural person capable of wrongdoing. That notion has indeed had its place in the law of the sea, but it is a bit of mythology, a fiction not to be applied to defeat a statute designed to protect and foster maritime enterprise. Whether, if the charterer were liable *in personam*, a lien would attach to the ship on the theory that a

bareboat charterer is the owner *pro hac vice*, we need not say, for, as will appear, we agree that it was not liable *in personam*.

It could be so only in case the fire was "caused" by its "design or neglect"; and "neglect" means personal, and not imputed, negligence. *Earle & Stoddard* v. *Wilson Line*, *supra* (287 U. S. 420). Only Okubo and Fegen can be even plausibly suggested as standing in the required relation to the charterer; and, although Okubo certainly did stand so, Fegen did not. Since the claimants argue otherwise we will consider the evidence in a little detail. In answer to interrogatories Okubo swore that "in case of sardine meal" the charterer "employed * * * Fegen to advise with the masters and chief officers on its loading and stowage in their respective vessels." Again, that the master and chief officer of the "Venice Maru" "supervised" the stowage "and, insofar as the loading and stowage of sardine meal was concerned, were advised by Mr. F. H. Fegen." Upon letters rogatory he swore that the charterer "employed * * * a surveyor * * * to inspect stowage on every vessel." Fegen swore that he "was appointed by Cornes & Co. at Kobe to lay out the manner and method of stowage of the sardine meal and to supervise such stowage * * * and I believe that Cornes & Co. were employed by Kawasaki Kisen Kabushiki Kaisha"; that he did so, "and gave instructions to Chief Officer of the 'Venice Maru' [fol. 2046] regarding manner and method of the stowage and arrangement of ventilation and also exercised supervision over said stowage and ventilation." This was very far from making Fegen the local manager at Kobe. It was Okubo who had that position, and whose personal dereliction was necessary to fix any liability upon the charterer for damage by fire. *Earle & Stoddard* v. *Wilson Line*, *supra* (287 U. S. 420); *Williams S.S. Co.* v. *Wilbur*, 9 Fed. (2) 622 (C. C. A. 9); *United States* v. *Charbonnier*, 45 Fed. (2) 174 (C. C. A. 4). The test is the same as that under the Limitation Statute (183, Title 46, U. S. Code, *Craig* v. *Continental Insurance Co.*, 141 U. S. 638, 646). Unless therefore Okubo was personally guilty of some negligence, the charterer was exonerated.

The claimants say that he was so guilty because he knew of the heating of the meal in the autumn of 1933 upon the "Montreal Maru" and the "Soyo Maru," and upon the

three ships in April, 1934, and because it was not enough merely to turn over the stowage to Fegen; particularly as he did not tell Fegen of the heating on the earlier voyages. In addition they say that Okubo was personally chargeable because two-thirds of the hatch of No. 1 hold was covered with deck cargo; and finally, because he did not detain the "Venice Maru" at Los Angeles and restow the meal after news had reached Japan that the cargo on the "Getsuyo Maru" had gone wrong. We agree that, although Okubo was not personally acquainted with what was necessary to protect the meal on such a long voyage, he had had ample notice that it was subject to heating. Moreover, heating can lead to fire, and failure to prevent heating would be a "cause" of any resulting fire. If therefore, in July, 1934, Okubo had taken no action the charterer might well have been liable. *Hines* v. *Butler*, 278 Fed. Rep. 877, 880 (C. C. A. 4); *Williams S.S. Co.* v. *Wilbur*, 9 Fed. (2) 622 (C. C. A. 9); *Bank Line Ld.* v. *Porter*, 25 Fed. (2) 843 (C. C. A. 4); *The Elizabeth Dantzler*, 263 Fed. Rep. 596. We think that he took adequate action.

[fol. 2047] He believed that the three April cargoes which went wrong (in spite of the use of "rice ventilators" in two of them), had carried bad meal, and, as we have said, he stopped all shipments from Nagoya. Two cargoes then came through safely, which, according to Kitamura, did not carry Nagoya meal. But Okubo did not rest with this, for he also retained Fegen. The claimants say that Fegen was not shown to have been competent, or at least that Okubo had no means of knowing whether he was. Fegen had had long experience at sea and ashore in the stowage of ships and the ventilation of cargoes, although he had had no actual sea experience with sardine meal, or apparently with other fish meal. The stowage of sardine meal was still in flux; it was not till the next year that "block and channel" stowage became the standard; and, although it is true that the larger the solid block and the longer the voyage, the more likely the meal is to heat, "rice ventilators" had for long been an accepted way of ventilating other heating cargoes. In July, 1934, it had not yet certainly appeared that, given properly made meal, such ventilators were not adequate to protect even such a large single block as half of 665 tons. (We say "half" advisedly, because, as we have said, the stow in No. 1 lower hold was cut into two blocks by a channel one foot wide.)

There is not the least evidence that anyone better qualified was available at Kobe, or, indeed, anywhere else in Japan. Nor can we say that Okubo's failure to tell Fegen of the earlier cargoes that heated, was negligent. He was justified in assuming that Fegen would familiarize himself with the charterer's past experience by inquiring of its masters. Besides, even if it was negligent not to inform him, it does not appear that Fegen did not inform himself; or that, if he did not, his ignorance made any difference; *i. e.*, that his knowledge of the charterer's past experience would have led him to discard "rice ventilators." Since the claimants have the burden of proving "neglect" under this statute—unlike the Limited Liability Statute—they must in any event fail upon [fol. 2048] this issue, for by no stretch can it be said that they proved that the fire was "caused" by Fegen's ignorance of the charterer's past experience. *The Strathdon*, 89 Fed. Rep. 374, 378; *The Salvore*, 60 Fed. (2) 683 (C. C. A. 2); *The Older*, 65 Fed. (2) 359 (C. C. A. 2).

The next claim is that the "Venice Maru," not only carried deck cargo, but stowed it upon the after two-thirds of No. 1 hatch. On July 11th the charterer received the cable of the "Venice Maru's" master at Kobe, saying that he had laded 450 tons of deck cargo and wished tarpaulins to be supplied him at Yokohama. Kitamura showed this to Okubo on the 16th, three days after the ship had left Yokohama, her last Asiatic port of call. Okubo could have done nothing till she got to Los Angeles, and nothing in the cable suggested that any part of the deck cargo was over the hatch. Nor could Okubo have done anything when he learned that the cargo of the "Getsuyo Maru" had heated. That vessel reached New York on July 29, the day that the "Venice Maru" reached Los Angeles. There is no evidence when Okubo first learned that the meal had heated, except of course that it could not have been before the 29th. It is most unlikely that he heard of it before the 30th, the day when the "Venice Maru" left Los Angeles. We must not clutch at such straws to find liability, or construe the Fire Statute grudgingly. Congress has in many other ways changed the law of shipping since it was passed, but in the eternal conflict between hull and cargo, the hull has been able so far to hold this ground; and in its last decision the Supreme Court showed no hostile disposition towards the statute. (*Earle & Stoddard* v. *Wilson Line*, *supra*, 287 U. S. 420). We hold that the charterer and the owner were

entitled to exoneration, and that on this, the chief issue, the decree should be affirmed.

The charterer and the owner challenged the finding that the storage had been negligent and made the ship unsea- [fol. 2049] worthy. If the stowage was such as made a fire likely, they apparently agree that she was unseaworthy; and she was, whether they agree or not. It follows that, if due diligence was not used in her stowage, due diligence was not used to make her seaworthy. Moreover, as to this issue, we are to look not alone to Okubo's conduct, for that duty is not delegable, although this the charterer and the owner dispute. The ship's bills of lading provide: "If the shipowner shall have exercised due diligence to make the steamer * * * seaworthy * * * in case of * * * damage * * * resulting from accident * * * or from unseaworthiness * * * if the * * * unseaworthiness was not discoverable by the exercise of due diligence" the cargo should contribute in general average. The charterer argues that, although it is true in cases arising under the Harter Act, the owner must show that due diligence has been used in order to hold a shipper for contribution in general average, it is because the Harter Act forbids an owner to relieve himself of the duty to use due diligence. But it says that that is not true under the Fire Statute which permits the owner to delegate all his duties to others, provided he selects proper delegates. Hence an owner may provide for contribution in general average to fire losses, although due diligence has not been used to make the ship seaworthy; and the doctrine of *The Jason*, 225 U. S. 32, does not apply to the full. We need not decide that question, because in any event the bills of lading must themselves provide for contribution notwithstanding the lack of due diligence to make the ship seaworthy. If they do not, the doctrine of the *Irrawaddy*, 171 U. S. 187, applies, and the owner being in unexcused fault cannot exact contribution.

The charterer says that the bills of lading did so provide because of the introduction in them of the word, "accident," which appears in the quoted language. We are not indeed clear what that added, but it makes no difference, for even [fol. 2050] if it covered a fire, the whole clause was subject to its introductory condition; "the shipowner shall have exercised due diligence to make the steamer in all respects seaworthy"; and to the later clause: "if the defect or unseaworthiness was not discoverable by the exercise of

due diligence." Certainly, when these two are read together, they cover more than a personal default of the shipowner; being primarily applicable to cases arising under the Harter Act, they make it a condition that due diligence shall have been exercised to make the ship seaworthy: *i.e.*, in the case at bar that she was so stowed as not to be likely to catch fire. Thus arises the correctness of the judge's findings that the "stowage was negligent and made the vessel unseaworthy."

An immense amount of testimony was taken as to the proper stowage of such cargo; and a very large part of it, especially that of expert surveyors and master mariners, was taken in court. The judge found, not only that the stowage was negligent, but that Fegen had not used "due diligence" to make the vessel seaworthy. Should we say that this finding was "clearly erroneous"? *Petterson Lighterage & Towing Corporation* v. *New York Central Railroad Company*, 126 Fed. (2) 992 (C. C. A. 2). The proper stowage of sardine, or other fish, meal has come before the courts in several cases and it so happens that the ship has always been found guilty of bad stowage. *Wilbur* v. *Williams S.S. Co.*, 9 Fed. (2) 940; affirmed 9 Fed. (2) 662 (*supra*); *The Neil Maersk*, 18 Fed. Supp. 824; affirmed as to the stowage, 91 Fed. (2) 932 (C. C. A. 2); *The Nichiyo Maru*, 14 Fed. Supp. 727, affirmed 89 Fed. (2) 539 (C. C. A. 4). That does not of itself answer the question at bar, for each stow is different, but Judge Chesnut's careful analysis of the evidence in the case of the three April, 1934, ships of the charterer now at bar, fits very closely here. As a new question we should be somewhat tempted to accept the opinion of the claimants' expert, Eriksen, that, by itself, the stowage "was about on the minimum of adequateness" before the covering of the hatch blocked the [fol. 2051] vertical "rice ventilators" which came up to its after side; but that when it was covered that "destroyed the minimum requirements of ventilation." Again we should be disposed to believe that the "rice ventilators" were themselves not adequate. At least so thought the two surveyors who saw the discharge at Balboa, and who said that they were too fragile anyway. We do not forget that the master of the "Venice Maru" swore that these surveyors had not seen the ventilators in place and that they were broken on the discharge, but that does not answer their testimony. Nor do we forget the sharp dispute as to

whether it affected the ventilation of the stow to cover the hatch, although it surprises us to have it said that it should not, especially since the hold was plainly planned to be ventilated at all four corners. We do not think it necessary to hold that the use of "rice ventilators" was of itself negligence. As we said at the outset, the proper stowage of such meal was still in flux in the summer of 1934, although the "block and channel" method turned out in the end to be better than "rice ventilators," in spite of the opinion of one expert. But in the case at bar there was evidence that the "rice ventilators" had not been themselves adequate and that the deck cargo obstructed them. We can have no assurance that out of the confusion and contradiction of such a record, we can come to a more reliable result than the judge. We cannot know, for example, how far he was led to find as he did by the testimony of those witnesses whom he saw; and, indeed, even as to those whom he did not see, his conclusions have some *prima facie* weight; we are entitled to attribute some value to his sifting of the evidence. We will not say therefore that the findings were "clearly erroneous."

We see no reason to disturb the award of costs. *Karrick* v. *Edes*, 19 Fed. (2) 693 (C. A. D. C.); *The Aakre*, 122 Fed. (2) 469, 475 (C. C. A. 2).

Decree affirmed.

[fol. 2052] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 18th day of February, one thousand nine hundred and forty-three.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Harrie B. Chase, Circuit Judges.

In the Matter of Petition of Kabushiki Kaisha Kawasaki Zosenjo, Owner and Kawasaki Kisen Kabushiki Kaisha, Bareboat Charterer of the SS Venice Maru for exoneration from or limitation of liability, Consumers Import Co., Inc., et al., Appellants

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

D. E. Roberts, Clerk.

[Endorsed:] United States Circuit Court of Appeals, Second Circuit. In re Kabushiki Kaisha Kawasaki Zosenjo, etc., and another. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Feb. 18, 1943. D. E. Roberts, Clerk.

[fol. 2054] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 2055] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed May 10, 1943

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, limited to the fifth question presented by the petition. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 2056] SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO RECORD—Filed July 15, 1943

It is hereby stipulated and agreed by and between proctors for the cargo claimants-petitioners and proctor for the respondents that the Transcript of Record to be filed herein in respect of the presentation of the question: "does the Fire Statute extinguish maritime liens for cargo damage or is its operation confined to in personam liability only", shall consist merely of the following:

1. Petition.
2. Order of Bondy, D. J., re ad interim stipulation.
3. Ad interim stipulation.
4. Order directing issuance of monition.
5. Monition.
6. Answer to petition.
7. Interrogatories and answers thereto by Y. Kawasaki, [fol. 2057] Managing Director of Kabushiki Kaisha Kawasaki Zosenjo.
8. Summaries of Stipulations of Fact as set forth in the Record filed in connection with the petition for a writ of certiorari in this case but omitting paragraphs B and C thereof.
9. Testimony of Mr. Shotaro Kitamura as set forth at folios 1851 to 1860 inclusive of the Record filed in connection with the petition for a writ of certiorari in this case.
10. Photostat of petitioner's Exhibit No. 9 (bill of lading).
11. Petitioner's Exhibit No. 17 (charterparty) as printed at folios 5779 to 5787 inclusive of the Record filed in con-

nection with the petition for a writ of certiorari in this case.

12. District Court opinion.

13. Finding of fact and conclusions of law of the District Court.

14. Final decree in the District Court.

15. Notice of appeal omitting therefrom paragraphs 1 to 5 inclusive.

16. Assignments of error omitting therefrom paragraphs 1 to 49 inclusive, number 52, number 54, numbers 57 to 60 inclusive, and number 63.

17. Circuit Court of Appeals opinion and order.

[fol. 2058] 18. Stipulation of counsel re Record.

19. Clerk's certificate.

The signing of this stipulation is not to be deemed a waiver of respondent's position that paragraphs numbered 7-10 inclusive of the notice of appeal (Item 15) and paragraphs numbered 61-62 of the assignments of error (Item 16) are immaterial to the question to which the argument has been limited by the Court.

Dated, New York, N. Y., July 13, 1943.

D. Roger Englar, T. Catesby Jones, Ezra G. Benedict Fox, Thomas H. Middleton, Proctors for Cargo Claimants-Petitioners. George C. Sprague, Proctor for Respondent.

[fol. 2059] [File endorsement omitted]

[Endorsed on cover:] Enter T. Catesby Jones. File No. 47382. U. S. Circuit Court of Appeals, Second Circuit. Term No. 32. Consumers Import Co., Inc., et al., Petitioners, vs. Kabushiki Kaisha Kawasaki Zosenjo and Kawasaki Kisen Kabushiki Kaisha, Petition for a writ of certiorari and exhibit thereto. Filed April 3, 1943. Term No. 32 O. T. 1943.